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Strengthening fundamental rights protection at European Union level:
the role of the Fundamental Rights Agency of the European Union

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Introduction

The Fundamental Rights Agency of the European Union (hereinafter FRA) is a recent institution within the EU institutional architecture. This Agency was created in 2007 and was entrusted to carry out monitoring activities with regards to fundamental rights. As such, the Agency was conceived as a fundamental element of a new engineering of fundamental rights protection at EU level. In fact, according to “*Leading by Example: a human rights agenda for the year 2000*”¹ – the agenda drafted by a *Comité des Sages* comprising Antonio Cassese, Catherine Lalumière, Peter Leuprecht and Mary Robinson – the creation of a monitoring agency focused on human rights was considered able to trigger a more proactive and central role of EU institutions in the protection of human rights.

However, although the Agency has in few years produced 81 reports, 5 handbooks in cooperation with the Council of Europe, 23 working discussion papers, issued 15 opinions, worked on 43 research projects and promoted dissemination strategies of a culture of respect for fundamental rights among the civil society, this institution is not very well known.

A partial explanation for this lack of knowledge with regards to the FRA is due to the fact that the Agency has neither legal nor judicial nor political power. In fact, the FRA is an independent Agency responsible for gathering data and reliable information on fundamental rights issues within the EU. It carries out an advisory function that relies on highly qualified experts in the field of human rights. It has no decision-making power and it cannot scrutinize the EU outgoing legislation. Therefore, at a first glance, it does not appear to be crystal clear what is the FRA effective weight concerning its role within the EU architecture.

In addition, the FRA is often seen as a new human rights institution that suddenly was embedded within the EU framework and, as a consequence, is trying to integrate itself within it.

According to this view, it is certainly true that the FRA is something completely new within the EU and international system of protection of human rights, but it is also worth noting that the idea of its establishment came from a long process of reflection on the integration of fundamental rights in the context of the EU.

¹ See Comité des Sages, “Leading by Example: A Human Rights Agenda for the European Union for the Year 2000” (1998).

Therefore, the role of the Agency and its contribution cannot be fully understood if its very origin and its relation with other human rights instruments, as for instance the EU Charter of Fundamental Rights, which were part of the human rights reforming process that started in 2000, are not clarified.

In light of these premises, the present thesis intends thereby to offer a complete account of the Agency with regards to its function and structure and concerning its role within the EU system. To this aim, the present thesis is organized in three chapters where the following itinerary is elaborated.

In the first chapter, the very origins of the Agency are understood. After a general overview of the evolution of the EU approach to human rights, the attention will be focused on five key moments which contributed to the creation of the Agency: the first is the introduction of article 7 TEU in the contest of the EU's enlargement and the particular concern of the European Community over minority groups; the second is the establishment of the European Monitoring Centre on Racism and Xenophobia (hereinafter EUMC); the third is the Austrian crisis and the three wise men report; the fourth is the proclamation of the EU Charter of fundamental rights; the last and most important is the institutional debate that occurred on occasion of the establishment of the EU monitoring Agency for fundamental rights.

Through this itinerary, it will be shown that the idea of the FRA was born in the context of the EU enlargement that brought into light a new wave of phenomena concerning racial and ethnic discrimination. In order to monitor such emerging phenomena in the EU context, the EUMC was created. As it will be seen, the Agency is built upon the EUMC and develops and extends its structure and its model. This partially explains the strong commitment of the FRA with non-discrimination issues that remains one of the main areas of activities of the Agency. The other element characterizing the Agency's birth is its relation with the new moment of reflection on human rights integration within the EU system. The Austrian crisis with the report of the three wise man, the idea of a EU Charter of Fundamental Rights and, subsequently, the project of a Constitutional Treaty incorporating the Charter, have contributed to reinforce the need of a monitoring body in the field of fundamental rights that is able, by offering data and information assessments, to assist the EU main institutions when they are implementing policies in the field of fundamental rights. It will be finally shown how these expectations regarding the EU fundamental rights monitoring body will be discussed during the legislative procedure set up in order to establish the new Agency. In this contest, it will be taken into consideration the different institutional

voices raised in this occasion and, in particular, the concerns expressed by the Council of Europe over the Commission's proposal to establish the FRA.

This historical overview on the debate prior to the establishment of the Agency will be particularly useful in order to take a further step in our itinerary. In fact, in the second chapter, given that the Agency's final regulation is the result of a final compromise among the several institutional actors, it will be conducted a comparison between the original Commission's proposal and the current FRA's statute. This analysis will show that the current founding regulation of the FRA has a rather limited mandate and apparently its relation with the EU Charter of Fundamental Rights does not find great visibility in the text of the Regulation. The Agency deals with those fundamental rights, which are included in the nine thematic areas of the Multiannual Framework (hereinafter MAF), and cannot deal with matters covered by the former third pillar. In addition, it is excluded any form of its involvement within the art. 7 mechanisms. It will also be brought into light that even though the Charter has not great visibility in the text of the founding regulation, it significantly influences the scope of the Agency's activities. In fact, according to art. 3(3) of the Founding Regulation, "The Agency shall deal with fundamental-rights issues in the European Union and in its Member States *when implementing Community law*"². With regards to Member States, the Agency has to carry out its activities in light of a concept of implementation that recalls the wording of art. 51(1) of the Charter, even if, in the case of the Agency, the formulation of art. 3(3) is even narrower than art 51(1), being limited to Community law. The use of the concept of implementation for determining the Agency's activities regarding its Member States reveals the existence of a relevant link between the Charter and the Agency.

It is indeed in light of the concept of implementation that the last part of our itinerary will be conducted. The use of the concept of implementation with reference to the Agency's activities with regards to the member states reveals that the Agency's activities should be carried out according to the same subsidiarity logic enshrined in art. 51(1) of the Charter. However, the concept of implementation is not as crystal clear as it looks like. Given the importance that such concept has, as a criterion that guides and shapes the Agency's work, the activities of the FRA in light of this concept will be analysed. After an overview focused on the undetermined nature of concept of implementation as laid down on the Charter, in its explanations and as interpreted in the case law of the Court of Justice of the European Union (hereinafter ECJ or CJEU), some of the main products of the Agency's

² Council Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/1 (hereinafter FRA Founding Regulation).

activities, such as its reports and opinions, will be analysed. To the aim of our inquiry, the activities related to the Fundamental Rights Platform, as a network of civil society organization, will not be considered in here but should certainly be taken into consideration in a follow up of the present research. For the moment only the FRA's publications will be analysed. As a result of our inquiry, it will be shown that the Agency's reports are not clear regarding how to interpret the expression "when implementing Community law" and they seem to follow the uncertain attitude of the ECJ that swings between a functional and a strict interpretation of such concept. This means that the borders of the monitoring activity of the FRA with regards to the Member States will not be able to be determined. It is finally argued that a possible solution to this uncertain status of the Agency's scope could be clarified in the perspective of the EU accession to the ECHR. This accession would require a clear definition of the competences of the EU regarding the ECHR. As a consequence, among the other institutions, even the Agency would be involved in a process of clarification of its competences and objectives that eventually could bring light to the contours of its activities.

CHAPTER I

Toward the Agency's establishment

Introduction – The European Union and human rights before the Agency's establishment: a process of human rights constitutionalisation – Constitutionalisation of a sanctioning mechanism in accession states – The European Monitoring Centre on Racism and Xenophobia – The Austrian crisis – The need of a bill of rights of the European Union – Toward the establishment of the Agency: how the European Union institutions shaped the legal structure of the Agency – 1. The First Commission's communication – 2. The Parliament's Resolution – 3. The Commission's second proposal – 4. The Council of Europe reaction – 5. The Final act

Introduction

As Armin von Bogdandy states “the creation of the Agency represents an institutional acknowledgement that the EU, at the dawn of the last century, has embarked on the journey of an EU-specific fundamental rights policy”.¹ At the same time, the establishment of this new institution is the consequence of the on-going process of the integration of human rights in the constitutional framework of the European Union started after the Second World War – an attempt that had to tackle several challenges in the past decades². In other words, since the '50s the EU gradually started - not without challenges, especially in the beginning of this developing process - to shape its fundamental principles and values and by doing so to make more visible the *aquis* of the European Union in the area of fundamental rights.

The present chapter intends to retrace briefly the process that led to the establishment of the Agency. After a general overview of the evolution of the EU approach to human rights, the attention will be focused on five key moments which contributed to the creation of the Agency: the first is the introduction of article 7 TEU and the particular concern of the European community over minority groups; the second is the establishment of the EUMC, the third is the Austrian crisis and the three wise men report; the fourth is the proclamation of the

¹ A. von Bogdandy, J. von Bernstorff, *The EU Fundamental Rights Agency Within the European and International Human rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law*, (2009) 46 C.M.L.R., 1067.

² “The topic of human rights protection and promotion has come to occupy a significant place in EU law and policy over the past decade and half, and the EU unquestionably now has a constitutional framework of kinds concerning human rights protection”, G. De Burca, *The Evolution of Human Rights Law*, in P. Craig, G. De Burca (eds), *The Evolution of EU Law* (OUP, 2011).

EU Charter of fundamental rights; the last and most important is the institutional debate that occurred on the occasion of the establishment of the EU monitoring Agency for fundamental rights.

This reconstructive overview aims to highlight the reasons behind the creation of a monitoring Agency and the complex framework that contributes to shape its structure and activities. Furthermore, by following the history of its establishment, it will bring into focus how the Agency structure and activities touches fundamental constitutional issues, which will be more extensively explored in the following chapters³.

The European Union and human rights before the Agency's establishment: a process of human rights constitutionalisation

The European legal order was mainly created in order to set up a common and internal market but then it gradually focused its attention on the protection of the individual's fundamental rights⁴. As Joseph Weiler stated "Neither the Treaty of Paris nor the Treaty of Rome contained any allusion to the protection of fundamental human rights"⁵. The post II World War starting project of a European community committed in human rights protection along with the Council of Europe and the European Convention was overshadowed by a pragmatic strategy focused on accomplishing a European common market⁶. In fact the wording of the Messina Declaration was crystal clear in announcing this approach⁷:

"The governments of the Federal Republic of Germany, Belgium, France, Italy, Luxembourg and the Netherlands believe the time has come to take a new step on the road of European construction. They are of the opinion that this objective should be achieved first of all in the economic sphere. They believe that the establishment of a united Europe must be achieved through the development of common institutions, the progressive

³ A. von Bogdandy, J. Von Bernstorff, *supra* note 1 at 1059.

⁴ See A. Chapman, *Human Rights and the European Community: A Critical Overview* (Nomos, Baden and Baden, 1991).

⁵ J. H. H. Weiler, *The Constitution of Europe, "Do the New Clothes Have an Emperor? And Other Essays on European Integration* (CUP, 1999) 107 et seq.

⁶ "Following the European Coal and Steel Community Treaty, neither the Euratom Treaty nor the ECC Treaty of 1957 made any mention of a role for the EU in relation to human rights, and the earlier drafting attempts of the 1950s were consigned to history". G. De Burca, *supra* note 2 at 466.

⁷ "What we see by the time of the drafting of the Euratom and European Economic Community Treaties is that the vision of a new European system as one which would have a substantial political role involving the protection of human rights against abuse by or within the Member States or even on the part of its own new institutions, and working alongside the Council of Europe and European Convention system in order to assure this, had disappeared. The ambitions of the new Communities were to be strictly determined by the common market mandate outlined the Messina Resolution, and the issue of human rights protection was remitted once again primarily to the realm of the national constitutional systems"; *ibid* 476.

fusion of national economies, the creation of a common market, and the gradual harmonization of their social policies”⁸.

The idea of a strong European community with a strong role in the field of human rights - as was outlined by the *Comite d'Etudes pour la Constitution Européenne* (CECE) and in the *European Political Community Treaty* draft (1951-53) - was met with resistance from some national delegations - in particular of the French delegation - during the Intergovernmental Conference 1953⁹. As a consequence of this reluctance to embrace the project of a European Community as was shaped in the treaty draft, on the 30th of August 1954 the French National Assembly refused to ratify the treaty. In conclusion, the curtain came down on the idea of a centralized commitment of the European community in the field of human rights and efforts were expended instead on the accomplishment of a common market¹⁰.

Almost ten years later, it was the European Court of Justice that gradually started to shape an understanding of human rights as part of the general principles of the EC law in cases like the *Stauder* case (1969), the *Internationale Handelsgesellschaft* case (1970) and the *Nold* case (1974)¹¹. In these cases, the European Court of Justice took the opportunity to tackle the reluctance of the German Administrative Court to recognize the supremacy of the Community Law with regards to fundamental rights¹². In the *Stauder* case, the Court of Justice underlined that “the fundamental human rights” are “enshrined in the general principles of Community law and protected by the Court”¹³. The *Internationale Handelsgesellschaft* case went further by stating that “the respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community”¹⁴. Finally, in the *Nold* case¹⁵ the

⁸ *The Messina Declaration*, Messina (Italy), 3 June 1955 in <http://www.eurotreaties.com/messina.pdf>.

⁹ See R. Dwan, Jean Monnet and the European Defence Community, 1950-54, (2001) 1/3 Cold War History.

¹⁰ A useful account of the evolution of the EU human rights approach is G. De Burca, *The Road Not Taken, The EU as a Global Human Rights Actor* (2011) 105/5 AJIL, 649.

¹¹ “the period of silence of the EC constitutional framework from 1957 until 1969, and the legal vacuum on the subject of human rights came to an end. From this time on, the terms of the debate had changed and the question shifted from whether the European Community should concern itself at all with fundamental human rights protection to what exactly its role should be in this regard”. DE BURCA, *supra* note 2 at 479.

¹² See J.M. Henckaerts, *The Protection of Human Rights in the European Union, Overview and Bibliography* (1994) 22 Int'l. J. Legal Info., 228.

¹³ Case C-29/69 *Stauder* [1969] ECR 419.

¹⁴ “as the Court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures, which are incompatible with fundamental rights recognized and protected by the Constitutions of those States. Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”. Case C-11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125.

¹⁵ Case C-4/73 *Kohlen- und Baustoffgroßhandlung* [1974] ECR 491.

Court recognized that the inspiration to the international treaties is another yardstick, in addition to the common constitutional traditions, for its human rights hermeneutic¹⁶.

It is no less relevant that in the same years after the inauguration of “European Political Cooperation” on foreign policy, the European Council drafted the first document on European Identity¹⁷ - also called Copenhagen Declaration 1973 - where human rights were highlighted as fundamental elements of European identity. Yet, in 1977, a Joint Declaration of the European Parliament, Council and Commission outlined the importance of fundamental rights as general principles of EU law¹⁸.

As a consequence of this renewed process addressed on human rights protection, the European Court of Justice notably increased the number of decisions concerning human rights compliance, and the institutions started to set up a range of initiatives in this field.

However, the Union started to engage more proactively with human rights in focusing its attention on minority rights after the fall of the Berlin wall¹⁹. Once the division between the western block and the communist block was dissolved, the European Community had to tackle the challenge of its eastern enlargement. Consequently, this new perspective encouraged the European Community to progressively strengthen the setting of its fundamental principles and values and specify standards for its membership. It is in this new context that we observe a significant development of the EU constitutional approach to human rights.

A first reference to human rights appeared in the Maastricht Treaty on the European Union (1992). The treaty recognizes human rights as part of the general principle of EU law by introducing art. F of the EU Treaty²⁰ and establishing a general criterion for EU membership under art. 49 EC.

¹⁶ According to Jean-Marie Henckerts: “The evolution after Nold is marked by an increasing reliance on international treaties, more specifically the European Convention on Human Rights”; see J. M. Henckaerts, *supra* note 12 at 233.

¹⁷ “The Nine wish to ensure that the cherished values of their legal, political and moral order are respected, and to pre- serve the rich variety of their national cultures. Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice - which is the ultimate goal of economic progress - and of respect for human rights. All of these are fundamental elements of the European Identity”. Copenhagen Declaration on European Identity, 14 December 1973.

¹⁸ “The European Parliament, the Council and the Commission stress the prime importance they attach to the protection of fundamental rights, as derived in particular from the constitutions of the Member States and the European Convention for the Protection of Human Rights and Fundamental Freedoms”; see Joint Declaration by the European Parliament, the Council and the Commission concerning the protection of fundamental rights and the ECHR, Luxembourg, 5 April [1977], OJ C 103/1.

¹⁹ See A. von Bogdandy, J. von Bernstorff, *The EU Fundamental Rights Agency within The European and International Human Rights Architecture: The Legal Framework and Some Unsettled Issues in a New Field of Administrative Law* (2009) 46 C.M.L.R., 46, 2009.

²⁰ Art. F of the Maastricht Treaty states: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law”.

An additional criteria of eligibility for EU membership was made at the European Council in Copenhagen (June 1993). According to the Copenhagen criteria:

“Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union”²¹.

However, it was the Amsterdam Treaty (1997) that “constitutionalised”²² and followed up these criteria. Firstly, the treaty strongly affirms the Union commitment to the principles of liberty, democracy, respect for human rights and fundamental freedom and the rule of law, principles which are common to the Member States. Secondly, a part of the Copenhagen criteria was incorporated in the treaty. Thirdly, the treaty has provided a new article 13 with the scope to strengthen the mechanism of protection against discrimination. Finally, under art. 7 TEU, a sanction mechanism has been set up against every member state, which is responsible for a serious violation of human rights. The suspension mechanism is an innovation of the Amsterdam Treaty: it was designed to bridge a gap in the EU legal order with regard to human rights protection and it certainly represents an “attempt to guarantee the future respect for the EU constitutional principles”²³.

Nevertheless, the “Haider affair” (1999) also brought to light the limits of this monitoring mechanism as a preventive instrument against human rights breaches. As a consequence, the Treaty of Nice (2000) has reformed art. 7 TEU by providing the possibility for Member States to address recommendations to the state that is found to be responsible for a clear breach of EU fundamental values and to request the assistance of a “group of experts” for drafting reports²⁴. At the same time, the EU Charter of Fundamental Rights and Freedoms was proclaimed by the presidents of the European institutions but without being incorporated in the Treaty of Nice. As we will see later, the main function of the Charter is to “strengthen the protection of fundamental rights in the light of changes in society, social progress and scien-

²¹ Copenhagen European Council (21, 22 June 1993), Presidency Conclusions.

²² De Burca *supra* note 2.

²³ B. De Witte, G. Toggenburg, *Human Rights and Membership of the European Union*, in S. Peers, A. Wards (eds), *The EU Charter of Fundamental Rights* (Hart Publishing, 2004), 59.

²⁴ Art. 7 of the Treaty of Nice states: “On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four-fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. The Council shall regularly verify that the grounds on which such a determination was made continue to apply”.

tific and technological developments by making those rights more visible”²⁵. Even though the Charter was not legally binding, its political “impact was immediate on the practice of the European Institutions”²⁶. In fact it triggered a process of fundamental rights concern within the activities of the EU institutions, gradually shaping the work of the Parliament, the Commission and later also of the Council of the EU²⁷.

After the failure of the Constitutional Treaty and despite its undoubted political value, the Charter continued not to be a legally binding document until the entry into force of the Lisbon Treaty (2009) that also introduces an obligation for the EU to accede to the European Convention on Human Rights.

In summary, from 2000 to 2009 we see to a period of “major constitutional change in the field of human rights”²⁸. This period was characterized by several institutional innovations. Some of the most relevant are: the creation of a network of experts in the field of fundamental rights, the institution of a Personal Representative on Human Rights to advise the high Representative for Foreign and Security Policy and Council Secretary General and finally the establishment of the FRA. As De Burca affirmed: “These moves formally marked the constitutional coming of age of human rights within the EU legal and constitutional framework”²⁹.

Therefore, given these premises and at this point of our inquiry, it becomes necessary to focus our attention on those crucial stages which have given a fundamental contribution to shape this framework and in particular to conceive the monitoring Agency for fundamental rights.

Constitutionalisation of a sanctioning mechanism in accession states

A relevant contribution to strengthen the human rights discourse in the EU agenda and also to identify the need of a monitoring body committed with human rights matters, as the FRA will be, is certainly offered by the process that set up a sanctioning mechanism capable of intervening breaches of human rights and also deeply connected to a renewed concern over minorities’ protection issues.

²⁵ Charter of Fundamental Rights of the European Union (2000/C 364/01), Recital 4, *Preamble* (hereinafter EU Charter of Fundamental Rights).

²⁶ P. Alston, O. De Shutter, *Introduction: Addressing the Challenges Confronting the EU Fundamental Rights Agency*, in P. Alston, O. De Shutter, *Monitoring Fundamental Rights in the EU, The contribution of the Fundamental Rights Agency*, (Hart Publishing, 2005).

²⁷ See O. De Shutter, *The Implementation of the Charter by the Institutions of the European Union*, in S. Peers, T. K. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights: a commentary* (Hart Publishing, 2014).

²⁸ De Burca, *supra* note 2.

²⁹ *ibid* 481.

After the Second World War, it was clear the general concern for human rights and the intention to build a community of States “based on shared and institutionally entrenched liberal-democratic principles”³⁰.

However, as we have already seen, the community was built under the project of an economic cooperation and integration that left aside the human rights discourse within the community framework³¹. In fact, “At the time of the Treaty of Rome, human rights were not of evident concern to the European Community. The original constituent treaties of the European Community only contained such human rights that were important for the functioning of the Common Market, and did not provide for the Member States to question human rights compliance within the Community”³². As a matter of fact, since the very beginning among the other economic freedoms the Treaty of Rome incorporated, the general principle of prohibiting discrimination on the ground of nationality are among the few fundamental economic freedoms that has been incorporated (art. 12 TEC). However, this principle was not fully implemented until the ‘90s.

At that time, an extensive human rights discourse was rather developed at an international level by the Council of Europe and the Organisation for Security and Co-operation in Europe organizations³³. Since 1949, the Council of Europe has developed a human rights monitoring system including conventions and multilateral agreements and a strict membership procedure³⁴. In 1989, after the disintegration of the eastern bloc, CSCE (now OSCE) began to be another important international organization monitoring the compliance of its member states with human rights standards³⁵.

³⁰ J. Batt, *Minority Rights and EU Enlargement to the East, Report of the First Meeting of the Reflection Group on the Long-Term Implications of EU Enlargement: the Nature of the New Border*, <http://www.eui.eu/documents/rscas/publications/workingpapers/9805p.pdf>.

³¹ “The need for such mechanism was not obvious in the earlier years of the European Community (EC) until the mid-1990s. This is mainly for two sets of reasons. First, the perceived nature of the EC as a primarily common economic market made it unnecessary to build into the organization any specific precaution against breaches of rights in Member States. Rights, in the minds of the European integration planners, could be safely entrusted to the Council of Europe, with the European Convention of Human Rights as its foundational document... It was only the evolution of the European Community toward a more political and constitutional entity, symbolically encapsulated by the adoption of the name of the European Union in the Maastricht Treaty (1992), that eventually placed rights and democracy on the Union’s agenda... Second,... It was only the ever more likely prospect of the eastward enlargement of the Union, an inevitable consequence of the fall of Communism and the removal of a fundamental division of the Continent, which drove the movement towards the institutionalization of sanctions for breaches of human rights” W. Sarduski, *Adding a Bite to a Bark? A Story of Article 7, the EU Enlargement, and Jörg Haider*, (January 4, 2010). Sydney Law School Research Paper No. 10/01. Available at SSRN: <http://ssrn.com/abstract=1531393>.

³² K. Shoraka, *Human Rights and Minority Rights in the European Union*, (Routledge, 2010), 11-67.

³³ See G. N. Toggenburg, *A Remaining Share or a New Part? The Union’s Role vis à vis Minorities After the Enlargement Decade*, EUI Working Paper LAW No. 2006/15.

³⁴ See V. V. Stoyanova, *The Council of Europe’s Monitoring Mechanisms and Their Relation to Eastern European Member States’ Noncompliance*, (2005) 45 S. Cal. L. Rev., 739.

³⁵ See J. Hughes, G. Sasse, *Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs*, (2003) 1 JEMIE, 1.

The opportunity for the EU to reconsider human rights discourse and, particularly, to think about the importance of setting up a sanctioning mechanism for human rights threats was offered by the end of the iron curtain, when the European Union had to face the Central-Eastern European States' requests to become its members. In fact the end of the Berlin wall created a new scenario for the EU. The European Union had to tackle the consequences of its enlargement. Several ex-communist countries intended to join the European Union and consequently the Union perceived for the first time the need to establish a set of standards to which these countries had to be conformed. In fact, as Joseph Weiler and Philip Alston stated:

“With enlargement, the Union will be importing new set of unresolved minority issues as well as additional human rights challenges, whose solutions will test the strength of many Community policies”³⁶.

In summary, the dissolution of the division between the eastern and western world and thus the will of many of the eastern countries to be part of the European Community generated two sets of related issues.

On the one hand, the Community had to make more visible its fundamental principles and values to the new aspiring Member States and in doing so it had to set up a monitoring mechanism strictly linked with them.

On the other hand, the history of the post-communist states brought to light a number of minority issues never seen before within the western bloc. In fact, the birth of new states from the dissolution of the USSR was characterized by the emergence of national majorities and by the development of several tensions with the corresponding minorities. The breaking down of Yugoslavia with its ethnic civil war was another dramatic example of what the EU had to tackle³⁷.

Of course, some of the first steps for a new human rights approach of the EU were already taken with the Copenhagen criteria which established political standards for EU membership, including among them minority protection³⁸, and with the Maastricht Treaty. By doing so the EU started to set up a membership procedure by borrowing the fundamental elements of the

³⁶ P. Alston, J.H.H. Weiler, *An 'Ever Closer Union' in Need of a Human Rights policy: The European Union and Human Rights*, in P. Alston (ed.), *the EU and Human Rights*, (OUP, 1999).

³⁷ “After 1989 most of the post-communist countries prioritized the strengthening of central state capacity and the position of the titular nationality, thereby running the risk of discriminating against, alienating and politicizing minority groups. The violent disintegration of the former Yugoslavia and a number of intractable post-Soviet conflicts as well as a perception of further conflict potential in view of sizeable minorities in many East European countries informed the EU's approach”. J. Hughes, G. Sasse, *supra* note 35.

³⁸ “Minority protection has a significant historical resonance for many CEECs. Minority management, whether by genocide, expulsion, coercion or accommodation is intrinsic to the historical emergence and development of many of these states, whose foundation was Wilsonian selective self-determination in the period after the peace treaties ending World War One in 1919-20”. *ibid*.

Council of Europe and OSCE monitoring mechanism³⁹, especially the Council of Europe, which was believed to represent “the antechambers of the EU membership”⁴⁰. However, it was the Amsterdam Treaty which represented a substantial departure towards a new human rights approach and therefore, for shaping a monitoring mechanism, an approach which we can trace back to the works of the Reflection Group and thereafter in the Inter-governmental Conference 1996.

The European Council at its Corfu Summit (24-25 June 1994) decided to establish a Reflection Group in preparation of the Inter-Governmental Conference (1996). The Reflection Group drafted a report that was submitted to the European Council in Brussels on the 5th December 1995. In the first part of the report, at the paragraph entitled “The Challenge”, the reflection group made clear the need to reinforce and renewed the common European project in light of the future Community integration:

“Men and women of Europe today, more than ever, feel the need for a common project. And yet, for a growing number of Europeans, the rationale for Community integration is not self-evident. This paradox is a first challenge.

When the European Communities were established some forty years ago, the need for a common design was clear because of the awareness of Europe's failure over the first half of this century.

Now, almost half a century later, the successive enlargements of the Union, the expansion of its tasks, the very complexity of its nature and the magnitude of the problems of our times, make it very difficult to grasp the true significance of, and the continuing need for, European integration”⁴¹.

The Report suggests three areas, which should be developed against this unstable background: making Europe more relevant to its citizens; enabling the Union to work better and preparing it for enlargement; giving the Union greater capacity for external action.

In particular, it is not a coincidence that under the paragraph entitled “The citizen and the Union”, the Reflection Group affirms:

“The Union is not and does not want to be a super-state. Yet it is far more than a market. It is a unique design based on common values. We should strengthen these values, which all applicants for membership also wish to share”⁴².

³⁹ G. Sasse, *EU Conditionality and Minority Rights: Translating the Copenhagen Criterion into Policy*, EUI working papers, RSCAS n. 16/2005, in www.iue.it/RSCAS/Publications/. See also P. Alston, O. De Shutter, *supra* note 26 at 66.

⁴⁰ J. Hughes, G. Sasse, *supra* note 35.

⁴¹ Reflection Group's Report, Messina 2 June 1995, Brussels 5 December 1995 Part 1. Available on the website of the European Parliament at <http://www.europarl.europa.eu>.

⁴² *ibid*.

Therefore, it has to be noticed that the challenge of a new enlargement had encouraged the EU to reinforce and strengthen its principles and values and how to protect them. Among these principles, the reflection group clearly recognizes human rights but also underlines the necessity to make more visible their protection through the EU accession to the European Convention on Human Rights and Fundamental Freedoms. It also mentions the idea of an EU bill of Rights and, most importantly, the report remarks on the necessity of “a provision allowing for the possibility of sanctions or even suspending Union membership in the case of any State seriously violating human rights and democracy”⁴³. Such a sanctioning mechanism is indeed part of a general strategy aiming at reducing citizens’ disaffection with the EU making visible and effective its principles and also is clearly connected with the prospect of EU enlargement⁴⁴.

However, the creation of a treaty provision that regulates such a sanctioning procedure wasn’t without difficulties. In fact, whereas the Presidency conclusions at the Madrid European Council (15-16 December 1995) recognized the Reflection Group’s Report as “a sound basis for the work of the Inter-Governmental Conference”⁴⁵ in the final event, only four States at the ICG saw the need to establish a sanction mechanism (Italy, Austria, Belgium and Spain) and even among them there wasn’t a common approach for drafting the future art. 7. Spain and Belgium⁴⁶ simply supported the general conclusion laid down by the Reflection’s Group Report.

Austria and Italy suggested a more radical solution formulated in the view of a Union better integrated and capable to count on a clear system of constitutional principles. According to this view, Austria remarked that at stake is the respect for fundamental rights at the heart of the common heritage of the EU Member States and regarding them as an essential aspect of European identity. Therefore the Austrian - Italian proposal suggested the insertion of a sanction mechanism in the EU Treaty and to insert it after the article on the accession conditions. In doing so, “the very structure of the drafting would clearly underline the sanctions-enlargement connection”⁴⁷. They also suggested conferring the EU Parliament over a more relevant role within the sanctioning procedure. The EU Parliament should have been equally authorised to propose sanctions and the voting requirement for the determination of a threat of human rights should have been less demanding.

⁴³ J. Hughes, G. Sasse, *supra* note 35

⁴⁴ K. Shoraka, *supra* note 32.

⁴⁵ European Council, Madrid (15 and 16 December 1995), Presidency Conclusions. Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00400-c.en5.htm.

⁴⁶ White Paper on the 1996 Intergovernmental Conference, Volume II, Summary of Positions of the Member States of the European Union with a view to the 1996 Intergovernmental Conference.

⁴⁷ K. Shoraka, *supra* note 32.

However, as we will often see in the journey that leads to the Agency establishment, the other Member States weren't confident in respect of the establishment of such a sanction mechanism able to threaten their sovereignty:

“...the scheme of the sanction mechanism as it arises from the IGC discussions till June 1996 also constitutes another illustration of the reluctance of the Member States to submit themselves to a constraining legal mechanism which could go partly at least, beyond their full control. And it was probably the last time that an idea of formally involving the Court of Justice was openly entertained. This idea, as we know, turned out to be a non-starter, and eventually the Article 7 mechanism became thoroughly political, with no traces of a legal or judicial character in the procedure”⁴⁸.

Therefore, the Irish Presidency of the European Council offered the decisive contribution article 7 as was laid down in the Treaty of Amsterdam. A contribution that was strongly affected by the Member States concerns:

“the mechanism of establishing the grave and persistent violation of article F principles, with the Council acting unanimously, at the proposal by the Parliament, the Commission or the on third of the Member States, with the state concerned being able to present its observation but without its vote being counted, with the actual measures being decided by the Council by qualified majority, at the recommendation of the Commission and after consultation with the European Parliament”⁴⁹.

In fact, the Member States' main concern was not to have control over the procedure and they were also reluctant to recognize a prominent role of the Parliament for initiating the whole procedure. As a consequence, at the time that art. 7 being adopted, “the idea that the Union should be equipped with a more routine and regular mechanism of monitoring the respect of the principle of non-discrimination had disappeared and had been placed outside the EU Treaty analysis”.

Yet, with regards to minority protection, even though the EU institutions, in particular the EU Parliament since its early stage, seriously engaged with this issue⁵⁰, the Amsterdam Treaty seems to be silent even if it accomplished the first step toward the constitutionalisation of the political accession criteria⁵¹. In fact, article 6(1) TEU does not contain any explicit reference to

⁴⁸ *Ibi.*

⁴⁹ Conférence des représentants des gouvernements des Etats membres, Approche suggérée par la Présidence, Object: droits fondamentaux, Bruxelles, le 8 octobre, CONF 3945/96.

⁵⁰ “The EU has become a visible player in the field of minority protection with the expansion of the enlargement perspective at the beginning of the 90s. This, however, does not mean that the Union has not addressed the topic before”. See G. Toggenburg, The EU's evolving policies vis-a-vis minorities: a play in four parts and an open end, August 2008 in <http://www.eurac.edu>.

⁵¹ C. Hillion, *The Copenhagen Criteria and their Progeny*, in C. Hillion (eds), *EU Enlargement: a legal approach*, (Hart publishing, 2004), 1-23.

the protection of minorities. We shall wait for the Nice Treaty to see the minority protection incorporated in an act of primary law. However, it is a matter of fact that the EU enlargement triggered a process of constitutionalisation not just of human rights but also of the principle of non-discrimination and minority protection. As we will see, the Agency will engage with all these issues, which in different ways shape its activities.

The European Monitoring Centre on Racism and Xenophobia

Another consequence of the end of the iron curtain is the renewed concern over phenomena of racism and xenophobia which is another element characterizing the Agency's work.

The first time that the necessity to set a mechanism for fighting every act and form of discrimination was stressed was in the Declaration against Racism and Xenophobia which was adopted by the European Parliament, the Council, the Representatives of the Governments of the Member States of the European Communities and the European Commission on 11 June 1986⁵². The Declaration recognized "the existence and growth of xenophobic attitudes, movements and acts of violence in the Community which are often directed against immigrants"⁵³ and stressed "the importance of adequate and objective information and of making all citizens aware of the dangers of racism and xenophobia, and the need to ensure that all acts or forms of discrimination are prevented or curbed"⁵⁴. As we have already observed, the end of the iron curtain and the establishment of new national states, especially in Eastern Europe, has led to the exacerbation of a growing number of ethnic conflicts.

Following these facts, the European Council of Corfu on 24/25 June 1994⁵⁵ condemned, in the Presidency conclusions, "the continuing manifestations of intolerance, racism and xenophobia"⁵⁶ and expressed "its determination to step up the fight against these phenomena"⁵⁷. To this aim it has welcomed the joint Franco-German initiative against racism and xenophobia consisting in the creation and thus the establishment of the Consultative Commission on Racism and Xenophobia (also called Kahan committee). More specifically, France and Germany proposed to:

⁵² Joint Declaration by the European Parliament, the Council and the Commission against racism and xenophobia, 11 June [1986], OJ C 158.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ European Council at Corfu, (24-25 June 1994), Presidency Conclusions, in the European Council: Conclusions of the Presidency 1995 (European Commission, Directorate General for Information, 1995), 13-14.

⁵⁶ *ibid.*

⁵⁷ *ibid.*

“constitute a Consultative Commission composed of eminent personalities charged with making recommendations on the cooperation between governments and the various social bodies in favour of encouraging tolerance and understanding of foreigners; develop a global strategy at EU level aimed at combating acts of racist and xenophobic violence and set up training efforts for officials in those parts of the national administrations most concerned by these phenomena”⁵⁸.

One year later, the Heads of States and Governments, which held a meeting in Cannes welcomed “the work carried on by the various Council bodies and the Consultative Commission”⁵⁹ and requested the Consultative Commission “to extend its work in order to study, in close cooperation with the Council of Europe, the feasibility of a European Monitoring Centre on Racism and Xenophobia”⁶⁰.

On the 21st and 22nd of June 1996, the European Council of Florence approved the establishment of a Monitoring Centre by stating:

“The European Council reaffirms the Union's determination to combat racism and xenophobia with the utmost resolve; it approves the principle underlying the establishment of a European Monitoring Centre. It asks the Council to examine the legal and budgetary conditions of the future Monitoring Centre as well as the links between the latter and the Council of Europe and to mandate the Consultative Commission on Racism and Xenophobia to continue its work until the Monitoring Centre is set up”⁶¹.

The two main tasks of the Consultative Commission can be summarized as follows: the initiation of the European Monitoring Centre, the inclusion of a provision in the treaties to combat racism and xenophobia. In fact, in its final report, the Consultative Commission pointed out two priorities for the strategy against racial and ethnic discrimination:

“The explicit and unequivocal recognition of the European Community's competence to combat racism and xenophobia, which we have recommended and which could be achieved by an amendment of the Treaty on European Union following the 1996 Intergovernmental Conference, will be the basis on which the Community should subsequently adopt concrete measures in this area. This applies to both substantive and institutional measures. Regarding institutional measures in particular, the Consultative Commission has recommended the establishment of a European Observatory on Racism and Xenophobia. In light of the long experience gained from setting up new Institutions under the aegis of the Community, in our view the Observatory should be established as an independent body attached to the European Commission”⁶².

⁵⁸ *ibid.*

⁵⁹ European Council at Cannes (26 and 27 June 1995), Presidency Conclusions.

⁶⁰ *ibid.*

⁶¹ European Council at Florence (21 and 22 June 1996), Presidency Conclusions.

⁶² European Council Consultative Commission (1995) "Final Report" Ref. 6906/1/95 Rev 1 Limite RAXEN

As a consequence, the Treaty of Amsterdam (1997) included several references against Racism and Ethnic discrimination: art. 29 TEU includes the commitment to fight racial discrimination within the area of freedom, security and justice; art. 13 created the competences of the Council to make adequate dispositions to, amongst other things, combat discrimination on the grounds of race or ethnic origin. The insertion of provisions against racial discrimination offered the opportunity to adopt three acts of secondary law: the Directive 2000/43/EC (implementing the principle of equal treatment between persons irrespective of racial or ethnic origin)⁶³; the Directive 2000/78/EC (establishing a general framework for equal treatment in employment and occupation)⁶⁴; and, the Council Decision 2000/750/EC (establishing a Community action program to combat discrimination 2001-2006)⁶⁵. Finally, the Non-Discrimination principle on the ground of racism was included in the EU-Fundamental Rights Charter⁶⁶.

Furthermore, on the 8th February 1998, the Consultative Advisory Commission initiated in Utrecht a Charter of European Parties for a non-racist Society, which was brought forward to be signed on. The main aim of the “Charter of European Parties for a non-racist Society”: to prohibit “cooperating with any political party which incites or attempts to stir up racial or ethnic prejudices and racial hatred”.

In the meantime, the EUMC was established on the basis of the Kahn Commission proposal by the Council Regulation (EC) No 1035/97 of 2 June 1997. The EUMC was based in Vienna. Although the EUMC started its mandate in 1998, it officially took place on 7 and 8 April 2000 at the Hofburg Congress Centre in Vienna during the course of the Vienna Forum – a conference on politics and racism. The event was linked by the media companies to the decision by the 14 EU Member States to impose bilateral measures against Austria following the formation of the coalition government including the FPÖ, as we will see in the next paragraph.

The EUMC used a network of national (RAXEN-Network) contact points in the respective Member States to carry out its duties and to encourage the cooperation between academic, non-governmental and also governmental organizations.

According to its regulation, its structure consisted of a Management Board, an Executive board and a Director. The Management Board was formed by independent members appoint-

⁶³ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁶⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

⁶⁵ Council Decision 2000/750/EC of 27 November 2000 establishing a Community action program to combat discrimination 2001-2006.

⁶⁶ EU Charter of Fundamental Rights, art. 21(1).

ed by each Member State, by the European Parliament and by the Council of Europe as well as a representative of the Commission. The Executive board included the Chair of the Management Board, the Vice-Chair and a maximum of three other members of the Managing board, including the person appointed by the Council of Europe and the Commission representative. The decisions of the boards had to be approved by a 2/3 majority. Furthermore, the EUMC had a staff of 37 people who report to the Director of the Centre. The Centre was able to recruit further researchers in order to increase its analysis capability and it could count on an annual budget of € 8,2 Million. According to art. 16 of its Council Regulation⁶⁷, the EUMC shall forward to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “a progress report on the Centre’s activities, together with proposals, if appropriate, to modify or extend its tasks, taking into account, in particular, the development of Community powers in the field of racism and xenophobia”⁶⁸. On 6 October 2000, the Commission forwarded a first Report to the Community institutions: given that the Centre had not been able to begin its activities in earnest until 1999 and that was not fully staffed until 2000, it was too early for a comprehensive assessment of the progress made by the EUMC.

Between Sept. 2001 and March 2002 the external evaluation of the British Centre for Strategy and Evaluation Services drafted its final report, which focused on EUMC activities and was subsequently presented to the European Commission in July 2002 before being published on the “Server Europa”. The report suggested that the tasks of the EUMC should have been divided into three distinct groups of activities: collecting and studying data; securing the contribution of civil society in all its forms; using the information to support the Community and the Member States and the wider public. From 1998 to 2006 the EUMC drafted 38 reports, where 5 are thematic reports, 4 comparative reports, and 12 annual reports, it delivered two opinions and two factsheets. Notably, the Centre offered the structural and geographic basis on which creating the EU Agency for Fundamental Rights. As we will see, the basic elements of this institution will be resumed and developed in the founding regulation of FRA as well as the task to combating phenomena of racism and xenophobia.

⁶⁷ Council Regulation (EC) No 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia OJ L 151. Council Regulation (EC) No 1652/2003 of 18 June 2003 amending Regulation (EC) No 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 245/33.

⁶⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the Activities of the European Monitoring Centre on Racism and Xenophobia, together with proposals to recast Council Regulation (EC) 1035/97 – COM (2003) 483 of 5 August 2003.

The Austrian crisis

An opportunity to further strengthen the monitoring mechanism was offered by the so-called Austrian crisis or the Haider Affair⁶⁹. At the elections of the low chamber of the Austrian Parliament, on the 3rd October 1999, Social Democrats won but the result was surprising, as the extreme right - wing, the Austrian Freedom Party, became the second political party in the country. After the numerous failures, which the chancellor Klima had to tackle in the attempt to form a government by creating a coalition between the largest party, Social Democrats, and the People's Party, on 1 February 2000 a coalition was eventually formed between the People's Party and the Freedom Party with President Klestil's approval. The Freedom Party obtained important seats in the government as well as the post of the deputy chancellor.

This political change in favour of the Austrian right wing party raised European Community concern over it, especially because of the political convictions of the Freedom Party Leader, Jorg Haider, against the enlargement of the European Union to the Central European States. Before the Freedom Party could become part of the government, he expressed on more than one occasion nationalistic statements, which referred to the negative consequences of the EU enlargement: immigration, crime and labour problems.

On January 2000, the Presidency of the EU issued its declaration. The statement was not the result of the EU initiative but it was issued on behalf of 14 Member States. In fact, it is worth noting that neither the European Commission nor the European Parliament were consulted for taking this action. The declaration listed three measures to take against the Austrian government: first, the Governments of XIV Member States would have not promoted or accepted any bilateral official at political level with an Austrian Government integrating the FPÖ; second, there would have been no support in favour of Austrian candidates seeking positions in international organizations; finally, Austrian Ambassadors in EU capitals would only have been received at a technical level⁷⁰. These sanctioning measures were applied when the new coalition had the approval of the Austrian president to start its mandate. Nevertheless, given these premises and their proper bilateral character, the sanctions were lifted very soon or really not fully implemented. What remains is the symbolic importance of this initiative aimed at strengthening the political identity of the EU. In the meantime, the European Commission called a meeting on 1 February 2000 to tackle the 14 Member States decision. The

⁶⁹ See M. Merlingen, C. Mudde, U. Sedelmeier, *Constitutional Politics and the 'Embedded Acquis Communautaire': The Case of the EU Fourteen Against the Austrian Government*, ConWEB No. 4/2000. Available at <http://les1.man.ac.uk/conweb/>.

⁷⁰ Statement by the Portuguese Presidency of the EU on behalf of 14 Member States (31 January 2000). Available at http://www.cvce.eu/content/publication/2009/12/16/8a5857af-cf29-4f2d-93c9-8bfdd90e40c1/-publishable_en.pdf.

Commission declared its commitment to monitor Austrian events under the framework of the treaty. In other words, the Commission underlined that the 14 States acted outside the EU constitutional framework and in particular not considering the monitoring mechanism set up by art. 7 and 6 TEU. Therefore, “the Commission has to act on the basis of values and law and not on the basis of instinct”⁷¹. The Austrian crisis brought to light the lack of a multilateral mechanism of protection of human rights and at the same time the limited margin of action of art. 7 TEU, which allows the Council to impose sanctions when a member state is found responsible of a persistent breach of the principles of the European Union.

On 29 June 2000, the 14 Member States in accordance with the Portuguese Presidency appointed a committee of “three wise men”. The committee was charged with the task to draft a report focused on Austria’s compliance with the “common European values”. At the same time the report offered specific recommendations about the art. 7 mechanism. They proposed the introduction of “preventive and monitoring procedures into art. 7 of the EU Treaty, so that a situation similar to the current situation in Austria would be dealt with within the EU from the very start. This would underline the fundamental commitment of the EU to common European Values. Such a mechanism would also allow from the beginning an open and confrontational dialogue with the Member States concerned”⁷². The report also pointed out the need to reinforce the link between policies and institutional arrangements such as “the creation of a Human Rights office within the Council reporting to the European Council; the appointment within the Commission of a Commissioner responsible for human rights issues; and, particularly the extension of the activities, budget and status of the existing EU Observatory on racism and xenophobia”⁷³. Such institutional measures had already been suggested by Joseph Weiler and Philip Alston⁷⁴ in their report drafted for the *Comité des Sages* which was responsible for *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000* (1998)⁷⁵.

The recommendations presented in the report were the object of discussion in the Nice IGC and led to reform of art. 7 in the Nice Treaty. In particular, art. 7 was equipped with a new paragraph 1 establishing a preventive mechanism prior to the breach determination pro-

⁷¹ European Commission, Austria : Declaration by the Commission, Brussels, 1 February 2000, IP/00/93.

⁷² Ahtisaari, Martti, Jochen Frowein and Marcelino Oreja (2000). ‘Report’ (‘Wise Men Report’). Adopted in Paris, 8 September 2000.

⁷³ Martti Ahtisaari, Jochen Frowein, Marcelino Oreja, *General conclusions of the Report covering the Austrian government’s commitment to the common European values and the evolution of the political nature of the FPÖ* (Paris, 8 September 2000), *Rivista di Studi Politici Internazionali* Anno 67, No. 4 (268) (Ottobre-Dicembre 2000), 651.

⁷⁴ J. Weiler, P. Alston, *An ‘Ever Closer Union’ in Need of a Human Rights Policy*, (1998) 9 EJZL, 658.

⁷⁵ The Comité des Sages consisted of Judge Antonio Cassese, Catherine Lalumière, Peter Leuprecht, and Mary Robinson. See Comité des Sages, “Leading by Example: A Human Rights Agenda for the European Union for the Year 2000” (1998).

cedure. In fact, the Council, acting by a majority of four-fifths of its members and after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach of the EU principles mentioned in Article 6(1) by a Member State and address appropriate recommendations to that State on a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission.

Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question. This passage of the provision seems to resemble what the *Comité des Sages* pointed out in its report. In other words, they underlined the importance to call upon independent experts who are able to offer qualified reports to the institutions on Member States respect of EU fundamental principles.

The need of a bill of rights of the European Union

The idea of a Charter of fundamental Rights of the European Union arose from the demand of making the *aquis* of the European Union more visible in the area of fundamental rights. Until the Cologne European Council 1999, where it was decided to prepare the Charter, the ECJ detained the primary role in the protection of fundamental rights in EU by considering them as part of the general principles of EU law⁷⁶. Furthermore, in its *Opinion 2/94*⁷⁷ the European Court of Justice also affirmed that the EC Treaty did not confer competence to the European Community to accede to the European Convention of Human Rights. In light of the difficulties faced by the European Community to succeed in the accession, the German Presidency of the EU proposed the creation of a EU Charter of Fundamental Rights by stating in the Cologne European Council that the “protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy... There appears to be a need, at the present stage of the Union’s prerequisite for her legitimacy... There appears to be a need, at the present stage of the Union’s development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union’s citizens”⁷⁸.

⁷⁶ See D. Anderson Q.C., C.C. Murphy, *The Charter of Fundamental Rights: History and Prospects in Post-Lisbon Europe*, EUI Working Papers LAW 2011/08. Available at www.eui.eu; S. PEERS, A. WARD (eds), *The European Charter of Fundamental Rights*, (Hart Publishing 2004).

⁷⁷ Opinion 2/94 on Accession by the Community to the EHCR [1996] ECR I-1759.

⁷⁸ Cologne European Council, ‘Presidency Conclusions’ 3 and 4 June 1999.

It is worth noting that scholars such as Joseph Weiler, U. Haltern and Antje Wiener expressed scepticism as regard to the adoption of an EU bill of rights⁷⁹. In particular, Weiler's concern seems to have been more focused on issues of implementation of human rights through a proactive system of policy-making rather than on reinforcing a mechanism of justifiability of fundamental rights already fully functional. To this aim, they suggested among others institutional reforms the creation of a monitoring body responsible to offer to the EU institutions reliable data on human rights compliance in the Member States.

At the same time, the Charter was also welcomed as an important instrument to reinforce human rights protection. The Charter was especially understood as a key element within the framework of a constitutionalised Union. According to this perspective, the EU shall become a federal state with its own bill of rights and thus with a human rights protection mechanism that could replace the proper mechanism of the Council of Europe.

It is also not so marginal considering the UK government observations on the initiative to have a EU Charter of fundamental rights. The UK Prime Minister stated that the Charter "should take the form of a political statement, rather than a legal text to be incorporated in the Treaties"⁸⁰.

These different considerations about the value of the Charter can be found within the "body" called "Convention" that was set up to draft the Charter. In particular, on one side the EU institutions as the European Commission, the European Parliament intended to draft a legally binding document, on the other side the Member States endorsed the idea to lay down a declaratory text that couldn't be more than a political declaration.

Of course the final result was a compromise between these two polarities. The Charter was solemnly proclaimed at Nice on 7 December 2000 by the European Parliament, Council of Ministers and European Commission (but not the Member States) rather than being incorporated within the treaties. At the same time the Convention drafted the Charter "as if" it might become legally binding.

However, the EU Charter for Fundamental Rights itself, since it was proclaimed in 2000, having only the political value to reinforce and make more visible the EU commitment with fundamental rights, it was also able to trigger a process of fundamental rights concern in the

⁷⁹ J.H.H. Weiler, *Editorial: Does the European Union truly need a Charter of Rights?*, in *European Law Journal*, Vol. 6, No. 2, 2000, 95-97. U. Haltern, *Europe Goes Camper: The EU Charter of Fundamental Rights From a Consumerist Perspective*, in: *Webpapers on Constitutionalism & Governance beyond the State 3*(2001). Available at http://www.wiso.uni-hamburg.de/fileadmin/sowi/conweb/conweb_wiener/2001/conWEB3-2001.pdf, 15; ANTJE WIENER, *The constitutional significance of the charter of fundamental rights*, in *German Law Journal*, Vol. 2, No. 18, 2001, pp. 1-9, 9, online at <http://www.germanlawjournal.com/index.php?pageID=11&artID=113>.

⁸⁰ Answer to written question of Mr Mitchell MP, Hansard HC Deb 30 November 1999 vol 340 c81W.

work of the EU institutions beyond the judicial process itself⁸¹. Indeed, since it still wasn't a legally binding document, the EU Charter for Fundamental Rights gradually shaped the work of the Parliament, the Commission and later also of the Council of the EU⁸².

At the 2004 Intergovernmental Conference, the Charter was a matter of debate within the larger discussion for drafting a Constitutional Treaty. As a consequence, the Laeken declaration mandated the Convention on the Future of Europe where they considered whether or not the Charter of fundamental rights should be included in the basic treaty⁸³. In the final report the working group invited to consider the incorporation of the Charter in the Treaty "in a form which would make the Charter legally binding and give it constitutional status"⁸⁴. Therefore the Constitutional Treaty contained the full Charter as Part II of the three-part text. However, after the Constitutional Treaty was rejected, as part of the recodification of the treaty, the Charter was removed from the text and a reference to the Charter was inserted in Article 6 of the revisited treaty.

By rejecting the Constitutional Treaty, it was clear that "the Member States fear of inadvertently attributing greater power and competences to the Union via the Charter"⁸⁵. In other words, granting legal status to the Charter was perceived as linked to questions concerning the delimitation of competences within the Union. The Charter was proclaimed once again in 2007 and become legally binding with the entry into force of the Lisbon Treaty (2009).

The fate of the Charter and the Fundamental Rights Agency are deeply connected. In fact, it will be shown below how the itinerary that led to the Agency's establishment has met the same difficulties faced by the Charter. Furthermore according to the Constitutional Treaty, the Agency was conceived as a monitoring body whose principle source had to be the Charter itself. However, it will be seen that the failure of the Constitutional Treaty and the elements characterizing the EU process of integration of human rights had a particular impact on its establishment.

⁸¹ See O. De Shutter, *The Implementation of the Charter by the Institutions of the European Union*, in S. Peers, T. Harvey, J. Kenner, A. Ward (eds), *Commentary of the EU Charter of Fundamental Rights*, (Hart Publishing 2014).

⁸² See G. De Burca, J. B. Aschenbrenner, *European Constitutionalism and the Charter* in S Peers, A Ward (eds), *The European Union Charter of Fundamental Rights*, (Hart Publishing 2004).

⁸³ European Council, 'Laeken Declaration on the Future of the European Union' Annex I to 'Presidency Conclusions' (14 and 15 December 2001).

⁸⁴ Working Group II Working Document 25, Brussels 14 October 2002.

⁸⁵ *Supra* note 59 at 22.

Toward the establishment of the Agency:
how the European Union institutions shaped the legal structure of the Agency

At the European Council in Cologne the idea to create a EU Human Rights Agency also emerged. The Presidency Conclusion in fact stated that “The European Council takes note of the Presidency's interim report on human rights. It suggests that the question of the advisability of setting up a Union Agency for *human rights and democracy* should be considered”⁸⁶.

The European Parliament was supportive of this initiative in a number of resolutions. In particular, it should be considered among the others the European Parliament *Resolution on the annual report on respect for human rights in the European Union* (16 March 2000), the *Resolution on International Human Rights and European Human Rights Policy* (16 March 2000), the *Resolution on the Human Rights situation in the European Union* (15 January 2003) and the *Resolution on the Communication from Commission to the Council and the European Parliament on the European Union's role in promoting human rights and democratization in third countries* (April 2002).

However, a decision to establish such an institution wasn't taken until 13 December 2003, on the occasion of the Representatives of the Member States meeting at the Brussels European Council:

“the Representatives of the Member States meeting within the European Council, stressing the importance of human rights data collection and analysis with a view to defining Union policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia and to extend its mandate to make it a Human Rights Agency to that effect. The Commission also agreed and indicated its intention of submitting a proposal to amend Council Regulation 1035/97 of 2 June 1997 in that respect”⁸⁷.

As a consequence, the European Commission welcomed this initiative and showed its intention to submit a proposal to amend the Council Regulation establishing the EUMC⁸⁸.

On 4-5 November 2004, the idea to establish a Human Rights Agency was also inserted in the *Hague Programme Strengthening Freedom, Security and Justice in the European Union*. In particular, the programme related the need of a Human Rights Agency to two relevant steps to be taken: the incorporation of the Charter in the Constitutional Treaty and also the EU access to the European Convention. Both of these steps were seen contributing to strengthen the EU's commitment to protecting human rights. In fact, from this perspective the EU and its institu-

⁸⁶ Cologne European Council 3-4 June 1999. Presidency conclusions.

⁸⁷ Council of the European Union, Presidency Conclusions Doc. 5381/04.

⁸⁸ Council Regulation (EC) n. 1035/97.

tions would be placed “under a legal obligation to ensure that in all its areas of activity, fundamental rights are not only respected but also actively promoted”⁸⁹.

Therefore, in this context, the Council of the European Union, recalling its firm commitment to oppose any form of racism, anti-Semitism and xenophobia as expressed in December 2003, expressed its appreciation of the Commission's communication on the extension of the mandate of the EUMC towards a Human Rights Agency⁹⁰.

Yet, on 16-17 December 2004, the European Council of Brussels “called for further implementation of the agreement by the representatives of the Member States meeting within the European Council of December 2003 to establish an EU Human Rights Agency which will play a major role in enhancing the coherence and consistency of the *EU Human Rights policy*”⁹¹.

The *Strategic Objectives 2005-2009. Europe 2010: A partnership for European Renewal Prosperity. Solidarity and Security* adopted by the Commission on 26 January 2005, underlined that

“the protection of fundamental rights and fight against discrimination must be put at the forefront of European action with new initiatives on anti-discrimination and establishing a European Agency of Fundamental Rights. Ensuring equal rights to all citizens and fighting against discrimination, including gender equality, should be mainstreamed into all European action. Europe should be the point of reference worldwide for the practical application of fundamental rights. A particular priority must be effective protection of the rights of children, both against economic exploitation and all forms of abuse, with the Union acting as a beacon to the rest of the world”⁹².

1. The First Commission’s communication

On October 2004 the Commission launched a public consultation on the Agency remit, tasks, structure, rights and thematic areas by issuing a Communication on the Fundamental Rights Agency⁹³.

In its communication, the Commission reveals its awareness that the creation of the Agency raises delicate questions such as how to determinate its legal basis. In fact, since the very beginning of the communication, the Commission decides to adopt a prudent approach and

⁸⁹ European Council, The Hague Programme: Strengthening Freedom, security and Justice in the European Union, (2005/C 53/01).

⁹⁰ See Council of the European Union, The Hague Programme Strengthening Freedom. Security and Justice in the European Union, OJ C 2005/C 53/01, 3 March 2005.

⁹¹ Council of the European Union, Presidency Conclusions 16238/04.

⁹² Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and COM (2005) 280 final, at 2.

⁹³ Communication from the Commission, The Fundamental Rights Agency Public consultation document COM (2004) 693 final.

to carefully examine the impact of the Community's limited powers in the area of fundamental rights when drafting its proposal for a regulation setting up the Agency. The Commission also intends to examine other delicate issues such as the financial resources and the definition of its field of action, its mission and tasks and the relations with the Council of Europe and other international institutions. Finally, it tackles the problems related to the adaptation of the EUMC existing structure to ensure that the Agency is effective.

In doing so, different and crucial players in the field of human rights, such as the EU institutions, the Member States and civil society, should be taken into account. They are encouraged to work synergistically with the Agency in order to make fundamental rights visible to “citizens and all those within the EU”⁹⁴.

The Agency should resemble the model of the national institutions for protection and promotion of human rights according to UN principles⁹⁵. However, “given the specificity of the EU”⁹⁶, such an institution should avoid being simply a duplication of these examples. According to the UN principles, such institutions have consultative, informative and monitoring functions and in particular, are able to formulate opinions and draft studies and reports and education and information schemes.

Given these premises, the Commission, even though many national institutions have also quasi-judicial powers, does not intend to confer those powers to the Agency. The treaty in fact confers such powers to the relevant EU institutions. Therefore the Commission, as supervisor of the proper application of the Community law, wants that its role must be respected and that the tasks of the Agency must not invade the powers conferred on the EU institutions by the Treaties. The Agency in fact should be a European public-law entity, separate from the Community institutions and with its own legal personality. It should carry out highly specific technical, scientific or administrative tasks defined in the instrument setting it up and will have no decision-making powers. It should provide support for the institutions, the Member States, the members of civil society and individuals in constant dialogue with the different international actors in the field of fundamental rights.

According to the Commission proposal, the Agency’s field of action should be art. 6 of the Treaty of European Union and the Charter of Fundamental Rights with due regard for the

⁹⁴ *ibid.*

⁹⁵ See the Paris Principles formulated at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris on 7-9 October 1991 and adopted by the United Nations Human Rights Commission by Resolution 1992/54 of 1992, and by the UN General Assembly in its Resolution 48/134 of 1993. It worth noting that the Council of Europe also formulated principles on the establishment of independent national human rights institutions for the promotion and protection of human rights (Recommendation No (97) 14 of 30 September 1997).

⁹⁶ COM (2004) 693 final.

principle of subsidiarity and to the Member States only when they are implementing Union Law (see art. 51 of the Charter). The Agency's field of action should also cover art. 7 and its broad scope. To this aim, the Agency is required to monitor fundamental rights "by area" and not to prepare reports by country. However, the consideration of art. 7 as further field of action of the Agency raises the problem of how the Agency's field of action should be defined. The Commission identifies two approaches to the problem.

First, if the Agency's remit was limited to the scope of Community law, its role would be to help ensure compliance with fundamental rights of both Community law and policies and implementation of the latter by Member States. According to this perspective, the Agency would complement the Community system of protecting and promoting existing fundamental rights and would avoid a duplication of the work of the other bodies operating at international and national levels. However, this solution would mean that the Agency could not be asked to collect and process the information needed to analyse a given situation in which Article 7 TEU proceedings were to be taken, if the situation had no connection with Union law or extended beyond the fundamental rights field.

Second, if the Agency's remit covered art. 7 of the Union Treaty, the article would allow the Union to act outside the field of EU law, in areas where Member States act autonomously. Furthermore, the procedure is not confined to failure to respect fundamental rights, as Article 7 refers to all the principles listed in Article 6(1). Therefore the Agency should in any event be required only to provide institutions with the expertise that allows them to base their decisions on reliable and objective data. The first problem that this approach raises is whether such an extensive remit, covering every situation in a Member State, can be reconciled with the aim of an effective Agency. Secondly, this could lead to overlap with work carried out by the Council of Europe and national human rights bodies at their respective levels. Therefore, the Agency should engage in continuous dialogue in order to identify the methods of cooperation that would place their expertise at its disposal.

The Commission in the attempt to define the field of action of the Agency does not limit it to the rights listed in the Charter of fundamental rights as such but the activities of the Agency must cover rights and thematic areas. Even in this case the Commission suggests two different approaches: according to the first the Agency should monitor all the rights protected by Community law and included in the Charter giving the Agency a broad field of action; the second approach would be to focus the Agency's work on thematic areas having a special connection with Community policies or the Union (immigration, asylum, non-discrimination, eth-

ical questions, guarantee of criminal proceedings, violence, etc.). Among these, racism and xenophobia would continue to be given priority by the Agency.

The Agency's geographic scope is confined to the Union. This gives clear importance to fundamental rights in the Union and also is a means of placing responsibility on its institutions in the field of fundamental rights.

Regarding its tasks, the Agency should collect data on fundamental rights to enable the Union to take fundamental rights fully into account when drafting and implementing its policies. This means focusing the Agency's tasks on two areas: data collection and analysis and the drafting of opinions. The Agency's main tasks should be the collection and analysis of objective, reliable and comparable data at European level by playing an active part in networking with other bodies.

The Agency should collaborate with NGOs, the social partners, universities and other partners involved in fundamental rights, as well as with the specialist bodies dealing with the protection of fundamental rights in the field of personal data and privacy.

A close cooperation must be established, like that between the Centre and the European Commission against Racism and Intolerance (ECRI), which provides for the participation of the Council of Europe.

Specific forms of cooperation with the Council of Europe must be defined bilaterally. The Agency should also develop close relations with, for instance, the Commissioner for Human Rights to ensure that their respective areas of competence complement each other. Special attention should be paid to the links, which the Agency could develop with national bodies, notably with a view to determining respective work programmes. A network could be set up between the Agency and the national agencies or equivalent bodies in the Member States.

With regards to the Agency's structure, the Agency must be independent. To this purpose its tasks should be conformed to an appropriate system of responsibility liability (political, financial, administrative, and legal) that should be clearly established. Furthermore, given the relevance of its role within the EU framework, the European commission, the European parliament, the Member states and the EU Council should appoint their representatives in its management bodies. To ensure that it is effective, the Agency's management bodies must: have the necessary expertise to define the Agency's work programme and also administer it; optimise the influence of the Agency on decision-makers in the Member States and the EU

institutions. Finally, the Commission considers advisable to add a scientific committee to the structures of the Centre (Management Board, Executive Board, Director)⁹⁷.

2. The Parliament's Resolution

On 26 May 2005, the Parliament adopted a *Resolution on promotion and protection of fundamental rights: the role of National and European Institutions, Including the Fundamental Rights Agency*⁹⁸. On the basis of this act the Parliament calls on the Commission to undertake and to present, in conjunction with its position on this Agency, a detailed study on the need for a similar structure (inside or outside the Commission) dealing with the provision of relevant information on human rights and democracy concerns in countries which are not covered by this Agency.

The Parliament believes that the Agency should make a contribution to further enhancing mutual confidence between Member States and constitute a guarantee of continued observance of the principles set out in Articles 6 and 7 of the Treaty on European Union and considers that the Agency should provide all the information required to develop the Union's legislative activity, monitoring role and policy on awareness raising for fundamental rights.

According to the European Parliament, the Agency must have a strong mandate and the power to follow the development of the implementation of the Charter of Fundamental Rights within the European Union and accession countries. It should also be able to cover third countries when they are involved in human rights issues affecting the Union and it should have special standing among EU agencies. Therefore, the Agency should operate as an umbrella organisation covering all human rights issues, so as to avoid having different structures doing the same work.

The Agency's structure should be multi-layered, a "network of networks", a specialised body with horizontal competences, in which each of the layers must play a role and contribute to the development of a fundamental rights culture in the Union. The Agency should gather all relevant information, analysis and experience available in European and national institutions, national Parliaments, governments and human rights bodies, Supreme/Constitutional Courts, NGOs and existing networks and especially the expertise of the EUMC and its information network, RAXEN.

With regards to its fields of action, the Agency should be structured on the basis of areas of concern of the Charter of Fundamental Rights - as a complement to the EUMC's remit to

⁹⁷ COM (2004) 693 final.

⁹⁸ European Parliament, Resolution on promotion and protection of fundamental rights: the role of National and European Institutions, Including the Fundamental Rights Agency, 2005/2007 (INI), 26 May 2005.

fight against racism and xenophobia. In fact, the Parliament affirms that in an enlarged EU the protection of national minorities is a major issue and it will not be achieved simply by fighting xenophobia and discrimination: “This complex problem must also be addressed from other angles and that the question of the protection of ethnic and national minorities should be one of the Agency's specific tasks”⁹⁹.

3. The Commission's second proposal

On June 30 2005, the European Commission adopted a proposal for a Council regulation establishing a European Union Agency for Fundamental Rights and a proposal for a Council Decision empowering the European Union Agency for Fundamental rights to pursue the Activities in Areas referred to in Title VI of the Treaty of the European Union. One proposal was a Regulation under the Treaty establishing the European community (TEC) as appropriate legal instrument for establishing a Community Agency and the second one was a decision under the Treaty of the European Union (TEU)¹⁰⁰. “A Regulation is considered the appropriate legal instrument for establishing a Community Agency. Rather the most appropriate legal instrument to empower the Agency to pursue activities in the areas referred to in Title VI of the TEU is a Council Decision”¹⁰¹.

a. The Explanatory memorandum

At first glance, it is worth noting that in the Explanatory memorandum, that precedes the effective proposal for a Council regulation, the Commission highlights the peculiar role of the Agency with regards to the EU Charter of Fundamental Rights by stating that “establishing an Agency for Fundamental Rights would have made the Charter more tangible, and the close relation to the Charter is reflected in the Agency's name”¹⁰². This is also evident with regard to the new legislation presented in the proposals. In fact, the proposals extend the scope from racism and xenophobia to cover all areas of fundamental rights referred to in the Charter.

It is also remarked that the decision to extend the mandate of the EUMC to become a FRA is in line with the specific commitments of the Union to respect and strengthen fundamental rights, as laid down in Articles 2, 6 and 7 of the Treaty on European Union.

⁹⁹ *ibid.*

¹⁰⁰ SEC (2005)849; COM(2005) 280 final.

¹⁰¹ *ibid.*

¹⁰² *ibid.*

Under the paragraph entitled “*the Consultation of interested parties and impact assessment*”¹⁰³, it is reported that the principle of establishing an Agency was welcomed as well as its independence and the principle of working in synergy with the other bodies.

Once again, the Commission observes that during the public consultation a broad consensus was given to the idea that the Charter should have been the point of reference for the mandate of the Agency. Rather, the issue of the possible competence of the Agency with respect to Article 7 TEU created divergences. On one hand, the Member States were in general, very prudent on this issue; on the other hand NGOs wanted the Agency to play a stronger role in this respect.

Furthermore, regarding the impact assessment the consultation created two options. It considered creating a focus observation Agency that gathers information on fundamental rights in a limited number of thematic areas having strongest links to EU policies, whose remit would have been “technical assistance”. It also summed up the idea of establishing a general Observation Agency similar to the first but covering more thematic areas. The first option was preferred as an effective option to achieve objectives but that entails only a medium financial cost and has a considerable degree of political acceptability. According this option, “the Agency’s mandate would be open to collecting and analysing data on fundamental rights with reference to, in principle, all rights listed in the Charter, but the thematic areas within the scope of Union law would periodically be defined for the Agency’s actions”¹⁰⁴.

The legal basis for the Agency is Article 308 TEC. The Commission explains it by stating: “according to the treaty, it is a general objective of the Community to ensure that its own action fully respects fundamental rights. The Agency’s establishment will further that objective, without there being specific powers provided for in the treaty to that end”¹⁰⁵.

At the same time, the appropriate legal basis for the proposal for a Council Decision entrusting the Agency with tasks in the area referred to in Title VI TEU is articles 30, 31 and 34 TEU.

According to the Commission, the proposal complies to both the subsidiarity principle and the proportionality principle. The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the Community. In fact, the Agency’s main activities should be “the Union wide collection and analysis of information, opinions and the dissemination of information, helping the Union itself to fully respect fundamental rights in its

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

action”¹⁰⁶. Therefore as a consequence of the genuinely European dimension of these tasks, the objectives of the Agency cannot be sufficiently achieved by the Member States. Community action would better achieve the objectives of the proposal for the following reasons: “the Agency should have to apply a uniform system governing the collection and analysis of information that ensures the compatibility and comparability of that data and thus allows a methodologically sound comparative scrutiny of the situation in European level”¹⁰⁷. This can be achieved successfully only by action at EU level. By acting at European level, the Agency is designed to provide information, which enable the effectiveness of policies within and between the Member States to be assessed and thus adds value in terms of devising and targeting policies. With regard to the proportionality principle it is affirmed that “building upon the existing body will make it possible to exploit existing expertise and experience and thus achieve the objectives in the most proportionate way”¹⁰⁸.

Finally, considering that the EUMC has an annual budget of €8.2 million and a staff of 37, the Commission proposes that the Agency becomes operational on 1 January 2007, with a mandate that is extended considerably. Furthermore, the establishment of an Agency takes between two and three years, and it is expected that a major extension will require the same period of time. Therefore the Agency will have a growing budget for the period 2007-13 in order to take into account the inevitable transition period¹⁰⁹.

b. The proposal for a Council Regulation

In light of these premises the proposal for a Council regulation establishing a European Union Agency for Fundamental Rights assumed the following shape.

Since the very beginning of the proposed regulation the fundamental principles of the Union and the value of the Charter are highlighted as points of reference for the respect of fundamental rights.

“(1) The European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common values to the Member States.

(2) The Charter of Fundamental Rights of the European Union reaffirms the rights as they result, in particular, from the constitutional traditions and international obligations

¹⁰⁶ *ibid.*

¹⁰⁷ *ibid.*

¹⁰⁸ *ibid.*

¹⁰⁹ The indicative financial planning is as follows: Budget 2007: €16 million; 2008: €20 million; 2009: €21 million; 2010: €23 million; 2011: €26 million; 2012: €28 million; 2013: €29 million. Total staffing of 100 is proposed.

common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms⁶, the social charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights”¹¹⁰.

Notably, such commitment with fundamental rights as enshrined in the Treaty and in the Charter is restated when the proposed regulation delineates the scope of the Agency activities. In fact according to the Commission’s proposal the Agency is carrying out its activities it should refer to “fundamental rights as defined in Article 6(2) of the Treaty on European Union and as set out in particular in the Charter of Fundamental Rights of the European Union as proclaimed in Nice on 7 December 2000”¹¹¹. Furthermore, as regard the scope of the Agency, in pursuing its activities, the Agency should deal with “the situation of fundamental rights in the European Union and in its Member States when implementing Community law”¹¹². The Agency activity has also to meet the “objectives set in Article 2 within the competencies of the Community as laid down in the Treaty establishing the European Community”¹¹³. Finally, upon request of the European commission the Agency can provide “information and analysis on fundamental rights issues identified in the request as regards third countries with which the Community has concluded association agreements or agreements containing provisions on respect of human rights, or has opened or is planning to open negotiations for such agreements, in particular countries covered by the European Neighbourhood Policy”¹¹⁴.

In light of such a scope for the Agency’s work, the Commission’s proposal provides the Agency with several tasks.

Firstly, the Agency should “collect, record analyse and disseminate relevant, objective, reliable and comparable information and data including results from research and monitoring”¹¹⁵. The data should be provided by different institutions: Member States, Union institutions, Community agencies, research centres, the national bodies, non-governmental organisations, relevant third countries and international organisations.

Secondly, It should also “develop methods to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member

¹¹⁰ SEC (2005)849; COM(2005) 280 final. Preamble.

¹¹¹ SEC (2005)849; COM(2005) 280 final. Art. 3(2).

¹¹² SEC (2005)849; COM(2005) 280 final. Art. 3(3).

¹¹³ SEC (2005)849; COM(2005) 280 final. Art. 3(1).

¹¹⁴ SEC (2005)849; COM(2005) 280 final. Art. 3(4).

¹¹⁵ SEC (2005)849; COM(2005) 280 final. Art. 4.1(a).

States”¹¹⁶, “carry out, cooperate with or encourage scientific research and surveys, preparatory studies and feasibility studies”¹¹⁷ and “organize meetings of experts and, whenever necessary, set up ad hoc working parties”¹¹⁸.

Thirdly, the Agency has the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty¹¹⁹.

The Council should have the possibility of requesting the Agency’s technical expertise in the context of proceedings commenced under Article 7 of the Treaty on European Union. The Council should also have the possibility of adopting a Decision pursuant to Title VI of the Treaty on European Union to empower the Agency to pursue its activities also with respect to areas covered by that Title (third pillar)¹²⁰.

The Agency should publish “an annual report on the situation of fundamental rights, also highlighting examples of good practice, thematic reports based on its analysis, research and surveys, an annual report on its activities”¹²¹.

Of particular significance is FRA cooperation with civil society, including non-governmental organisations, the social partners, research centres and representatives of competent public authorities and other persons or bodies involved with fundamental rights matters. It should promote dialogue at European level and participate in discussions or meetings at national level. To this purpose the Agency should organise, with relevant stakeholders, conferences, campaigns, round tables, seminars and meetings at European level to promote and disseminate its work¹²².

Finally, it should raise awareness of the general public on fundamental rights issues by developing a communication strategy which would consist in set up documentation resources accessible to the public and prepare educational material, promoting cooperation and avoiding duplication with other sources of information¹²³.

The Agency activities should be implemented within the limits of the thematic areas as defined in the MAF. The MAF should be adopted by the European Commission and it should cover five areas determining the thematic areas of the Agency’s activity. Such thematic areas

¹¹⁶ SEC (2005)849; COM(2005) 280 final. Art. 4.1(b).

¹¹⁷ *ibid.*

¹¹⁸ SEC (2005)849; COM(2005) 280 final. Art. 4.1(c)

¹¹⁹ SEC (2005)849; COM(2005) 280 final. Art. 4.1(d)

¹²⁰ SEC (2005)849; COM(2005) 280 final. Art. 4.1(e)

¹²¹ SEC (2005)849; COM(2005) 280 final. Art. 4.1(f)(g)(h).

¹²² SEC (2005)849; COM(2005) 280 final. Art. 4.1(i)(j).

¹²³ SEC (2005)849; COM(2005) 280 final. Art. 4.1(k).

must always include “the fight against racism and xenophobia”¹²⁴. It also should be in line with the Union priorities as defined in the Commission’s strategic objectives and avoiding thematic overlap with the remit of other Community bodies, offices and agencies. At the same time, the Agency will be allowed to work outside these thematic areas to respond to requests from the European Parliament, the Council or the Commission.

The Agency should also carry out its activities in light of its Annual Work Programme, which must be in line with the Commission’s annual work programme¹²⁵.

The Commission’s proposal provides also that the Agency sets up and coordinates an information network¹²⁶. Such task would ensure the provision of objective, reliable and comparable information, drawing on the expertise of a variety of organizations and bodies in each Member State and taking account of the need to involve national authorities in the collection of data. To this purpose, the Agency shall cooperate with governmental and non - governmental organisations and bodies competent in the field of fundamental rights at the Member State or at European level¹²⁷.

The Agency should also coordinate its activities with those of the Council of Europe and in particular with regard to its Annual Work Programme¹²⁸. Therefore, the Community should enter into an agreement with the Council of Europe for the purpose of establishing close co-operation between the two institutions. Such agreement should provide the obligation of the Council of Europe to appoint an independent person to sit on the Agency’s Management Board.

The Agency structure should include a Management Board, an executive board and a director.

The Management Board is composed by an independent expert appointed by each the Member States, one appointed by the European Parliament; one appointed by the Council of Europe; and two representatives of the Commission. The Management Board elects its Chairperson and Vice-Chairperson and ensures that the Agency performs the tasks entrusted to it. It should be the Agency’s planning and monitoring body. In particular, the Management Board should:

1. “adopt the Agency's Annual Work Programme on the basis of a draft submitted by the Agency’s Director after the Commission has delivered an opinion. The Annual Work Programme shall be transmitted to the European Parliament, the Council and the Commission;

¹²⁴ SEC (2005)849; COM(2005) 280 final. Art. 5.1(b)

¹²⁵ SEC (2005)849; COM(2005) 280 final. Art. 5.1(4)

¹²⁶ SEC (2005)849; COM(2005) 280 final. Art. 6.

¹²⁷ SEC (2005)849; COM(2005) 280 final. Art. 8.

¹²⁸ SEC (2005)849; COM(2005) 280 final. Art. 9.

2. adopt the annual reports comparing, in particular, the results achieved with the objectives of the annual work programme; these reports shall be transmitted not later than 15 June to the European Parliament, the Council, the Commission, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;
3. appoint and, if necessary, dismiss the Agency's Director;
4. adopt the Agency's annual draft and final budgets;
5. exercise disciplinary authority over the Director;
6. draw up an annual estimate of expenditure and revenue for the Agency and send it to the Commission;
7. adopt the Agency's rules of procedure on the basis of a draft submitted by the Director after the Commission has delivered an opinion;
8. adopt the financial rules applicable to the Agency on the basis of a draft submitted by the Director after the Commission has delivered an opinion;
9. adopt the necessary measures to implement the Staff Regulations of Officials of the European Communities and the Conditions of Employment of Other Servants of the European Communities;
10. adopt the procedures for applying Regulation (EC) No 1049/2001¹²⁹ of the European Parliament and of the Council"¹³⁰.

The Management Board can delegate any of its responsibilities to the Executive Board, except the adoption of the annual work program, the annual reports, the appointment or demission of the Agency director, the adoption of the annual draft and financial report, the adoption of the internal rule of procedures and of the financial rules. Decisions by the Management Board should be taken by a simple majority of the vote's cast, except decisions concerning the adoption of the annual work program, the annual report and the appointment or demission of the director. The Chairperson has the casting vote. Notably, the person appointed by the Council of Europe to sit in the Management Board has the right to vote on decisions concerning the adoption of the annual work program and the annual reports.

The Director of the European Institute for Gender Equality and the Directors of other relevant Community agencies and Union bodies can attend as observers the meeting of the Management Board when invited by the Executive Board¹³¹.

The role of the Executive Board is to assist the Management Board. The Executive Board should be made up of the Chairperson and the Vice-Chairperson of the Management Board

¹²⁹ Regulation (EC) no 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

¹³⁰ SEC (2005)849; COM(2005) 280 final. Art. 11.4(a)(b)(c)(d)(e)(f)(g)(h)(i)(j).

¹³¹ SEC (2005)849; COM(2005) 280 final. Art. 11.

and two Commission representatives. The Executive Board should be convened by the Chairperson to prepare the decisions of the Management Board and to assist and advise the Director. It adopts its decisions by simple majority and the Agency's Director should participate in the meetings of the Executive Board, without voting rights¹³².

Finally the Director is appointed by the Management Board on the basis of a list of candidates proposed by the Commission.

Article 14 of the proposed regulation deals with the Agency's responsibility to set up a Fundamental Rights Forum¹³³. The Forum should be composed of representatives of non-governmental organizations committed to the field of fundamental rights and to fight against racism, xenophobia and Anti-Semitism, trade unions and employer's organizations, relevant social and professional organizations, churches, religious, philosophical and non-confessional organisations, universities and qualified experts and European and international bodies and organisations.

The Forum should be a mechanism for the exchange of information in relation to fundamental rights issues and the dissemination of knowledge. It makes possible a close cooperation between the Agency and relevant stakeholders. The Forum plays also a relevant role as regards the Annual Work Programme by making suggestions before being adopted. It also gives feedback and suggests follow up on the basis of the annual report on the situation regarding fundamental rights adopted. The Forum should be chaired by the Director and its meetings are convened annually or at the request of the Management Board.

4. The Council of Europe reaction

As a reaction to the Commission's proposal for establishing the FRA¹³⁴ and considering the McNamara report prepared within the Committee on Legal Affairs and Human Rights¹³⁵ the Parliamentary Assembly of the Council of Europe (hereinafter PACE) adopted a Resolution 1427 (2005) on 18 March 2005¹³⁶.

At the very beginning of the resolution the Assembly considers positively that

¹³² SEC (2005)849; COM(2005) 280 final. Art. 12.

¹³³ SEC (2005)849; COM(2005) 280 final. Art. 14.

¹³⁴ De Schutter, Olivier, *Division of tasks between the Council of Europe and the European Union in the Promotion of the Human Rights in Europe: Conflict, Competition and Complementarity*, 15 January 2007, <http://crdho.uclouvain.be/-documents/Working.Papers/WP-REFGOV-FR-11.pdf>.

¹³⁵ 'Plans to set up a Fundamental Rights Agency of the European Union', Doc 10241, Draft resolution and draft recommendation adopted unanimously by the Committee on 27 January 2005.

¹³⁶ PACE, Resolution 1427 (2005) on 18 March 2005.

“the creation of a Fundamental Rights Agency within the EU could make a helpful contribution, provided that a useful role and field of action is defined for it and that the Agency therefore genuinely “fills a gap” and presents irrefutable added value and complementarity in terms of promoting respect for human rights. However, defining such a role presupposes careful reflection within the EU about the aims, content, scope, limits, and instruments of its own internal human rights policy”¹³⁷.

As the Assembly pointed out

“a multiplication of European institutions in the field of human rights will not necessarily mean better protection of those rights. Conversely, there is no point in reinventing the wheel by giving the agency a role which is already performed by existing human rights institutions and mechanisms in Europe. That would simply be a waste of taxpayers’ money”¹³⁸.

The Council of Europe indeed shows its concern over the creation of institutions whose mandates overlap the activities and the tasks of institutions already existing and functional, and in particular those who duplicate its work in the human rights area. These initiatives are seen as weakening the individual authority of these institutions and consequently may provoke a dilution of human rights protection.

In fact, in the view of the PACE, instituting a duplicate mechanism of human protection would jeopardize the ideal of European system without dividing lines, especially in the area of human rights. It is particularly this area that demands, “Europe should be united by the same common standards and values”¹³⁹. Therefore, it sees necessary to give the EU Agency “a well-defined, focused and complementary role”¹⁴⁰:

“The Agency should be an independent institution for the promotion and protection of human rights within the legal order of the EU, along the lines of similar national institutions that exist in several Member States. The Agency should collect and provide the EU institutions with information about fundamental rights that is relevant to their activities, and thus contribute to mainstreaming human rights standards in the EU decision-making processes”¹⁴¹.

According to the PACE, this understanding of the Agency’s role has relevant implications.

First, the Agency should have a mandate whose scope corresponds to that of EC/EU law. In fact, its role should be to promote compliance with fundamental rights in both Community

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*

law and policies, and when the EU Member States implement them. The Agency should not extend its remit outside EC/EU competence, where Member States act autonomously and are supervised by the European human rights bodies set up by the Council of Europe. In other words, whereas the EU mechanism of human rights protection has a broader extension¹⁴², the Agency should not be allowed to deal with fundamental rights in general but only when the Member States implement the EU/EC law. We will show in the following chapters how the decision to shape the scope of the Agency according to this restrictive approach raises further difficulties.

Second, the Agency should not assess general human rights situations in specific countries¹⁴³. Its work should be focused on specific thematic areas involving fundamental rights and having a special connection with EC/EU policies. In doing so the Agency would avoid to perform tasks and to present assessments, which can compete with those of the bodies of the Council of Europe. As a consequence the Agency will address its thematic reports only to the relevant institutions of the EU (Commission, Council and Parliament) and not to the Member States¹⁴⁴.

Third, the Agency should include among its reference instruments not only the EU Charter of Fundamental Rights and the ECHR but also the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Framework Convention for the Protection of National Minorities.

In order to avoid a duplication of the activities of the Council of Europe, the PACE recommends providing the Agency's regulation with provisions concerning cooperation and coordination of its activities with those of the Council of Europe. In particular the Agency's regulation shall include:

¹⁴² As De Shutter explains, "articles 6 and 7 of the Treaty on European Union define human rights, along with democracy and the rule of law, as part of the values on which the Union is founded; and they give the Council the possibility both of adopting sanctions against a State which, according to the determination made by the Council, has seriously and persistently breached the principles mentioned in Article 6(1) EU (see Article 7(2) to (4) EU and, for the implementation of these sanctions in the framework of the EC Treaty, Article 309 EC), and – since the entry into force of the Nice Treaty on 1 February 2003 (OJ C 180, of 10.3.2001) – of determining that there exists a clear risk of a serious breach by a Member State of the common values on which the Union is based and addressing recommendations on that basis to the Member State concerned. In addition, a number of instruments adopted in the field of judicial cooperation in criminal matters contain a human rights clause". See De Shutter, *supra* note 81 at n.2.

¹⁴³ PACE Recommendation 1744 (2006), Follow-up to the 3rd Summit: the Council of Europe and the proposed fundamental rights agency of the European Union, adopted on 13 April 2006 on the basis of the report prepared within the Committee on Legal Affairs and Human Rights (doc. 10894, rapp. Mr Jurgens)

¹⁴⁴ The Council of Europe bodies are already accountable for monitoring the EU Member States actions at the national level in areas within the scope of EU law and their findings are addressed directly to those Member States.

- “a. explicit provisions establishing the rule of non-duplication with the role, functions and activities of the institutions and mechanisms of the Council of Europe and undertake a duty of co-operation and co-ordination with the Council of Europe, especially as regards the drawing up and implementation of the Agency’s programme of activities;
- b. a mandatory provision for the full participation of the Council of Europe in the management structures of the Agency;
- c. a guarantee that the Community enters into an agreement with the Council of Europe for the purpose of establishing close co-operation between the Organisation and the Agency”¹⁴⁵.

In its reply the Committee of Ministers agrees with the PACE by stating that

“the Agency’s mandate should focus on human rights issues within the framework of the European Union, address its advice to the EU institutions and ensure that unnecessary duplication with the Council of Europe is avoided”¹⁴⁶.

Also the Committee on Legal Affairs and Human Rights of the Council of Europe¹⁴⁷ expressed concern over the proposal for a Council Regulation of the European Commission establishing a European Union Agency for Fundamental Rights and a Council decision empowering the Agency to pursue its activities in areas referred to in Title VI of the Treaty on European union of 30 June 2005. According to the Committee on Legal Affairs and Human Rights of the Council of Europe, PACE should only accept an Agency whose mandate complies with the following issues:

- i. Notwithstanding the EU Member States are bound by the main Council of Europe Human Rights Instruments¹⁴⁸, the Agency should not make reference to them in its work. However, its mandate should mention these Council of Europe instruments.

- ii. The Agency’s mandate should not include third countries with which the EU has, is negotiating or is planning to negotiate agreements containing human rights clauses. This would duplicate activities of the Council of Europe risking double standards and “drawing new di-

¹⁴⁵ PACE Resolution 1427 (2005) on 18 March 2005.

¹⁴⁶ In this context, it is recalled that “the existing arrangements for co-operation between the Council of Europe and the European Observatory on Racism and Xenophobia have worked to the full satisfaction of both organisations and wishes to see a similar arrangement for the Council of Europe’s participation in the Agency’s bodies”. PACE Doc. 10729 on 20 October 2005.

¹⁴⁷ PACE Doc. 10894 on 11 April 2006.

¹⁴⁸ Also The European Court of Justice have ruled that the ECHR forms part of the general principles of Community law.

viding lines in Europe”¹⁴⁹. The Agency could play only a role related to the activities of candidate countries in fulfilling the accession criteria¹⁵⁰.

iii. The Agency should not be allowed to assess the human rights performance of specific states and address its conclusions and opinions to them. The advisory support of the Agency should be only addressed to the EU institutions, within the EU legal framework.

iv. As regards the setting up of a Fundamental Rights Forum through which outside actors would make suggestions for the Agency’s annual work programme and make proposals on the basis of the annual report. Given that the annual report would be very wide-ranging, this could duplicate the activities of the Council of Europe. In particular, the Agency’s engagement with civil society associations active in the field of human would duplicate the activities of the Commissioner for Human Rights.

v. The Agency’s mandate should explicitly require to avoid any possible duplication of the activities of the Council of Europe and clearly show the added value of the Agency’s work to the overall European human rights protection system.

vi. According to the proposal presented by the European Commission the Council of Europe would be less effectively represented on the Agency’s management structures than it is on those of the current EUMC. In particular, the proposal does not provide a place for the Council of Europe’s representative on the Executive Board and limit her or his voting rights on the Management Board and as regards the Agency’s work.

Finally, the PACE also mentions the specific contribution of the European Parliament as regards the Agency’s establishment. The European Parliament had a total of five rapporteurs responding to the Commission’s proposals¹⁵¹. All the rapporteurs produced drafts and proposed a total of 131 amendments to the Commission’s proposals. Three additional documents

¹⁴⁹ PACE Resolution 1427 (2005) on 18 March 2005.

¹⁵⁰ This issue was suggested by Sub-committee E of the UK House of Lords EU Committee. See HOUSE OF LORDS European Union Committee 29th Report of Session 2005–06 Human rights protection in Europe: the Fundamental Rights Agency Report with Evidence 4 April 2006.

¹⁵¹ Mrs Kinga Gál (Hungary, EPP/ED) and Mrs Magda Kósáné Kovács (Hungary, SOC), who reported on the proposal for a regulation and on the proposal for a decision, respectively, on behalf of the Committee on Civil Liberties, Justice and Home Affairs (LIBE); Mr Cem Özdemir (Germany, Greens/ EFA) who prepared an opinion on behalf of the Committee on Foreign Affairs (AFET); Mr Ignasi Guardans Cambó (Spain, SOC), who prepared an opinion for the Committee on Constitutional Affairs (AFCO); and Ms Emine Bozkurt (Netherlands, SOC), who prepared an opinion on behalf of the Committee on Women’s Rights and Gender Equality (FEMM).

containing some 200 amendments were submitted. Considering them the PACE concludes rising alarm on them:

“the Committee on Legal Affairs and Human Rights of the Council of Europe expresses his alarm at the extremely ambitious nature of some of these, which suggest either ignorance of or wilful blindness to the concerns – even the very existence – of the Council of Europe”¹⁵².

a. Juncker’s Report

The PACE resolution also mentions the outcomes of the Juncker’s report. On 11 April 2006, Jean-Claude Juncker, Luxembourg Prime Minister, presented to the PACE a report on relations between the Council of Europe and the European Union. The report was drawn up at the request of the Heads of State or Government of the 46 Member States of the Council of Europe, meeting at the Warsaw Summit on 16 and 17 May 2005, sets out recommendations for the improvement of cooperation and coordination between the two organisations¹⁵³. Among the European Union institutions considered, the report dedicates a specific section to the Agency’s establishment and lays down the following recommendations:

- I. “The Council of Europe must remain the benchmark for human rights in Europe. The EU must, therefore, draw more systematically on its expertise; this applies equally to EU Member States, candidate countries and non-Member States that are members of the Council of Europe, in respect of the EU’s bilateral relations, neighbourhood policy, association agreements and the stabilisation and association process.
- II. The Council of Europe must remain responsible for monitoring its Member States and ensuring that they respect human rights. It should make regular evaluations in each of its Member States, on a country-by-country basis. The reference value of its thematic reports must be strengthened.
- III. The Agency must be strictly complementary to the Council of Europe. It is essential, therefore, that its mandate be limited to human rights issues that arise in connection with the implementation of Community law, i.e. strictly within the EU’s internal legal system.
- IV. The Agency’s mandate should explicitly mention the ECHR and other key Council of Europe instruments as reference texts.

¹⁵² PACE Doc. 10894 on 11 April 2006.

¹⁵³ ‘A sole ambition for the European continent’, report prepared by Jean-Claude Juncker to the attention of the Heads of State or Government of the Member States of the Council of Europe, 11 April 2006 (hereafter referred to as the ‘Juncker report’).

V. The Council of Europe should be represented on the Agency's management bodies"¹⁵⁴.

The report is clearly another expression of the Council of Europe fear to be marginalized by the incumbent process of integration of the EU. In fact, as Juncker states:

“Although each has enriched the other, the two organisations remain at best a shaky team. Although each has borrowed from the other, they have never been able to make themselves permanently complementary”¹⁵⁵.

Therefore the report recommends that the Agency mandate should be necessarily restricted to deal with human rights issues concerning the implementation of EU law. At the same time, it restates the primacy of the Council of Europe in the field of human rights as regards its member states and invites the EU to not go beyond its boundaries¹⁵⁶.

b. Limited role of national Parliaments in the Consultation procedure

The PACE also points out that the national Parliaments played a limited role in the Commission's proceedings. In fact, during the consultation procedure several countries raised concerns similar to those of the PACE but these inputs did not seem to be seriously considered by EU institutions.

Notably, after the failure of the Constitutional Treaty supporters of the Agency started to claim for the establishment of a strong and extensive Agency. However, according to PACE reasoning the entry into force of the Constitutional Treaty would have provided the national Parliaments with a greater role within the EU's legislative processes. Therefore, the PACE concludes that the proposals concerning the Agency would have been “more realistic” and “acceptable”¹⁵⁷ if the concerns expressed by national Parliaments¹⁵⁸ would have been taking into account by the EU's institutions.

¹⁵⁴ *ibi.*

¹⁵⁵ *Ibi.*

¹⁵⁶ See O. De Shutter, *The division of tasks between the Council of Europe and the European Union in the promotion of Human Rights in Europe: Conflict, Competition and Complementarity*, Working paper series : REFGOV-FR-11. Available at <http://cridho.uclouvain.be/documents/Working.Papers/>. M. Kolb, *The European Union and the Council of Europe* (Palgrave Macmillan 2013).

¹⁵⁷ PACE Doc. 10894 on 11 April 2006.

¹⁵⁸ See particularly the UK position regarding the FRA's establishment: “Respect for fundamental rights has been for many years a general principle of the Community, and the Agency should look first at those human rights which thereby form part of Community law. In this context, the Charter of Fundamental Rights could also be used as a starting point, as a statement of rights, freedoms and principles applicable at Union level, bearing in mind its horizontal Articles and the official explanations. In addition, although it should not play a policy or operational role on human rights issues in third countries, it is for consideration whether the Agency should be available to provide assistance to countries interested in EU best practice, for example as part of the accession process or European Neighbourhood Policy. The UK believes that an Agency established with such a remit

In addition PACE affirms that issues such as “the Agency’s legal basis, subsidiarity and proportionality”¹⁵⁹, “the fate of the EU Constitutional Treaty”¹⁶⁰ in connection with regards to the EU accession to the ECHR and the legal status of the EU Charter of Fundamental Rights, “the role of national Parliaments”¹⁶¹ and “the eventual agreement between the Agency and the Council of Europe”¹⁶² should be further developed.

As regards the Agency’s legal basis, the Commission considers article 308 TEC as the appropriate legal basis for the FRA. Such provision allows for decisions intended to further the objectives of the Community. However, PACE underlines that considering the objectives included in Article 2 TEC “equality between men and women” seems to be the only one of potential relevance to a human rights body. As a consequence this would imply that the EU has no competence to establish an Agency.

Furthermore, PACE also points out that during the consultation procedure, the French Assemblée nationale, the Czech Senate and the Sub-committee E of the UK House of Lords EU Committee expressed similar doubts about the validity of art. 308.

Therefore it concludes that “it would be absolutely inappropriate for a human rights protection body to be established by a decision that was wholly or partially *ultra vires*”¹⁶³ and it invites the institutions to provide further explanations.

c. Subsidiarity Principle

Interestingly PACE raises further concerns as regards the EU’s application of the principle of Subsidiarity. According to its view the EU definition of the principle of Subsidiarity is limited. In fact it does not seem to include any reference to the relationship between EU action and the activities of other international organizations such as the Council of Europe. Such lack of any reference to international organizations would clearly have a certain impact on the Agency’s establishment. Indeed, according to PACE “in determining whether an act at community

would be able to focus on tasks of greatest priority to citizens throughout the EU. Any role for the FRA based upon Articles 6 and 7 TEU would compromise its effectiveness and run the risk of overload. It would also lead to unwelcome and inefficient duplication with other established or developing institutions in the Council of Europe, within the Union itself, and within Member States – in the case of the latter also compromising the principle of subsidiarity”. Summary of the UK position regarding the establishment of the European Fundamental rights Agency. Available at <http://ec.europa.eu>.

¹⁵⁹ PACE Doc. 10894 on 11 April 2006.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

¹⁶² *ibid.*

¹⁶³ *ibid.*

level has clear advantages, it should be compared also to the acts of EU Member States acting in other international *fora*.”¹⁶⁴

Furthermore, by referring to Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed in 1997 to the Treaty establishing the European Community (TEC)¹⁶⁵, PACE criticises the reasons used for justifying the Agency’s compliance with the principle of Subsidiarity in the Explanatory Memorandum to Commission’s Proposal. Such reasons are considered too general and cursory:

“These reasons, however, relate only to a very general definition of the Agency’s activities: for instance, there is no mention of the possibility of country-specific monitoring or of the Agency’s role in non-EU Member States that are members of the Council of Europe. Furthermore, they do not address the question of whether Member States, acting in other international fora, can satisfactorily achieve some, or all, of the objectives proposed for the Agency”¹⁶⁶.

Notably, it is also pointed out that although Rule 34 (now Rule 42) of the European Parliament’s Rules of Procedure requires it “to pay particular attention to whether a legislative act is in conformity with the principle of subsidiarity”. None of the five rapporteurs makes any mention of subsidiarity in the respective reports.

PACE further mentions the opinions expressed on this issue by national parliaments. The German Bundesrat stated that the account of the scope of the Agency does not comply with the principle of Subsidiarity. The French Senat raised doubts on the utility of the Agency and that its establishment was a priority for the EU. Finally, the French Assemblée nationale agreed with these conclusions and regretted the lack of prior evaluation of the necessity of creating such an Agency¹⁶⁷.

Therefore, in light of these considerations PACE concludes that the European Commission’s proposal does not sufficiently satisfy the test of subsidiarity.

¹⁶⁴ *ibid.*

¹⁶⁵ “[i]n exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with... For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators... For Community action to be justified, both aspects of the subsidiarity principle shall be met...” Protocol No. 30 on the application of the principles of subsidiarity and proportionality, annexed in 1997 to the Treaty establishing the European Community (TEC).

¹⁶⁶ PACE Doc. 10894 on 11 April 2006.

¹⁶⁷ On the objections of the House of Lords, the German Bundesrat, the French Senate and Assemblée, see the notes in W. Hummer, The European Fundamental Rights Agency, in A. Reinisch & U. Kriebaum (eds), *The law of international relations – Liber Amicorum Hanspeter Neuhold* (Eleven International Publishing, 2007), 117–144.

d. Principle of proportionality

According to PACE, the Commission's proposal does not give as much attention to the principle of proportionality as to the principle of Subsidiarity. The principle of proportionality provides that "the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties"¹⁶⁸. However, "the objectives of the relevant treaty appear to have little relevance to the activities proposed for the Agency"¹⁶⁹.

By drawing upon the same argument used for the principle of subsidiarity, PACE states that "most of the activities proposed for the Agency do not correspond to activities set out in the relevant treaty". This implies that the Commission's proposal does not satisfy the test of proportionality.

Furthermore, once again none of the five rapporteurs of the European Parliament refers to the principle of proportionality, despite the Rules of Procedure of the European Parliament requiring particular attention to be paid to it.

Therefore PACE invites the EU institutions to further consider the compliance of the Commission's proposal with the test of proportionality. Indeed, even in this case

"given the extremely limited reference to human rights objectives in the Treaty establishing the European Community, the increasingly ambitious scope of the various proposals and amendments for the Agency's mandate would appear to be going further and further beyond what is required to achieve these objectives"¹⁷⁰.

e. Failure of the Constitutional Treaty

PACE also considered that

"All of the most significant decisions concerning creation of the Agency were taken during the optimistic period between completion of the draft Treaty and the negative French and Dutch referenda"¹⁷¹.

Indeed, in July 2003, the Convention on the Future of Europe completed work on the draft Treaty establishing a Constitution for Europe, which was signed by the EU Member States

¹⁶⁸ Art.5 TEU.

¹⁶⁹ PACE Doc. 10894 on 11 April 2006.

¹⁷⁰ *ibid.*

¹⁷¹ *ibid.*

and candidate countries in October 2004. However, in May and June 2005 France and Netherlands voted against ratification.

In light of these events Mrs Gál, principal rapporteur for the European Parliament's LIBE committee, considers that "in view of the actually suspended constitution-making process of the European Union (EU), the rapporteur considers that it is the right moment for Europe to flag the protection and promotion of fundamental human rights"¹⁷².

At the same time the failure of the EU Constitutional Treaty means that "the anticipated legal environment within which the Agency would have begun operating does not yet exist"¹⁷³.

Indeed, with the entry into force of the treaty, the EU's Charter of Fundamental Rights would have become legally binding on the EU institutions and on Member States when implementing EU law and would have been one of the Agency's main reference texts as was intended to be.

Furthermore, the treaty would also have provided the EU to access to the ECHR, thus

"ensuring that all sources of political, legal and administrative authority over European citizens were bound by the same basic human rights standards and supervisory mechanisms. Without the Court having subsidiarity jurisdiction over the human rights compliance of EU acts, the Agency will lack an ultimate reference point for ensuring that its own activities in the context of the EU are consistent with the wider European human rights protection system"¹⁷⁴.

In consideration of these inevitable difficulties PACE agrees with the UK Parliament's Joint Committee on Human Rights when it states in its contribution to the consultation procedure that

"we are in a period in which it is not clear whether the significance of fundamental rights within the EU legal order will be radically changed by the coming into force of the new constitutional treaty"¹⁷⁵.

Therefore the PACE concludes that it necessary to postponed the establishment of the Agency with the purpose to further clarify its powers and its functions. In fact, until the fate of the Constitutional Treaty and of the Charter is not defined, it will be difficult to determine the Agency's mandate.

¹⁷² European Parliament, Draft Report on the proposal for a Council regulation establishing a European Union Agency for Fundamental Rights 2005/0124(CNS). Rapporteur: Kinga Gál.

¹⁷³ PACE Doc. 10894 on 11 April 2006.

¹⁷⁴ *ibid.*

¹⁷⁵ UK Parliament Joint Committee on Human Rights, European Fundamental Rights Agency

According to PACE another difficulty raised from the failure of the Constitutional Treaty is that national Parliaments have no formal role in scrutinising draft legislation. Rather the Constitutional Treaty would have provided the national Parliaments with a greater role within the EU legislative process. It is not negligible, indeed, the fact that several national Parliaments have expressed doubts on the Agency's establishment in the stage of the Consultation procedure¹⁷⁶.

Therefore PACE asks to the EU institutions not to create the Agency until all national Parliaments have the opportunity to deliver their opinion on the matter. It states that

“Since the Agency is being justified by reference to the EU Constitutional Treaty, despite that treaty not yet having come into force, it seems only proper in this instance that other relevant intentions of the Treaty, which was agreed as a package of measures, should also be given effect”¹⁷⁷.

Furthermore PACE does not think it is opportune to finalize any cooperation agreement between a future Agency and the Council of Europe. Indeed, the Agency mandate has to be determined before assessing the content of the procedures for a possible cooperation.

In conclusion, the PACE thereby remarks the position of the heads of state and government at the Warsaw Summit. They reaffirmed the prominence of the role of the Council of Europe in promoting and protecting human rights and decided to create a new framework for enhanced cooperation between the Council of Europe and the EU in particular in the area of human rights.

5. The Final act

In 2005 the Austrian Presidency at EU Council invites the EU general affairs and External Relations Council at its meeting in Luxemburg on 12 June 2006 to take a final decision.

“The negotiations on the mandate for the new European Union Agency for Fundamental Rights are to be concluded in 2006. This Agency will follow on from the former European Monitoring Centre on Racism and Xenophobia and will, similarly, have its headquarters in Vienna. The Fundamental Rights Agency is due to begin work on 1 Janu-

¹⁷⁶ These include the Dutch Senate, the German Bundesrat, the French Senat and Assemblée nationale, the Czech Senate, the Estonian, Latvian and Lithuanian Parliaments and the Polish Sejm, and the UK Joint Committee on Human Rights.

¹⁷⁷ PACE Doc. 10894 on 11 April 2006.

ary 2007 and will be a centre of expertise for fundamental rights issues at the EU level¹⁷⁸.

To this end, the EU Council's working party on Fundamental rights and Citizenship was established. However, the Council was not able to come to a final decision and the dossier concerning the Agency's establishment was transferred to the Permanent Representatives Committee (COREPER II).

Notably, the Vice President of the Commission Franco Frattini and the Member of the European Parliament Kinga Gal expressed their disappointment for the delay in the attempt to find a solution.

Therefore, in the concluding statements of the European Council in Brussels on 15 and 16 June 2006 was remarked:

“taking note of the progress achieved on the setting up of the European Union Agency for Fundamental Rights, the European Council calls for the necessary steps to be taken as soon as possible, so that the Agency is up and running as from 1 January 2007”¹⁷⁹.

In the European Council, several Member States (Germany, Great Britain, the Netherlands and Slovakia) raised concerns over the expansion of the competencies of the Agency in the areas covered by the former third pillar and its monitoring function as regards the infringement of important basic values according to article 7 TEU. Despite that, the Council adopted the final regulation establishing a European Union Agency for Fundamental Rights on 15 February 2007.

The Agency establishment is the result of a long itinerary that has concerned the integration of a human rights discourse into European Union architecture. Phenomena such as EU enlargement, the recrudescence of racism and xenophobia, the project of a Constitutional Treaty and its failure as long as the drafting of the EU Charter of Fundamental Rights have contributed to raise the need of a new body designed to assist the EU institutions catalysing information and data on fundamental rights issues. However, the creation of the Agency was not completed without difficulties. The Agency and its monitoring function arose the concerns of several Member States and of the Council of Europe, which were alarmed by attributing a broad mandate to the Agency. The result of this debate is expressed in the final found-

¹⁷⁸ See The Austrian Presidency, Federal Ministry of Foreign Affairs 23 November 2005. Available at http://www.eurosfair.prd.fr/7pc/doc/1134635746_presidence_autrichienne_2006.pdf.

¹⁷⁹ European Council of 15-16 June 2006, Doc. 10633/06 16 June 2006, Presidency Conclusions, par. 11.

ing regulation of the Agency. The Regulation is a compromise between the different positions, which emerged during the debate 2003-2007. In the next Chapter, the final regulation will be analysed in comparison with the Commission's proposal. In doing so, it will be detected the fundamental elements of the compromise that was reached on February 2007 and it will be bring into light its final guise.

CHAPTER II

The Final Compromise: The Council Regulation 2007

Introduction – The Preamble – 1. Setting up a monitoring agency for fundamental rights: four essential elements – 2. A restrictive remit for the Agency – 3. Three main tasks – 4. From the multilevel cooperation to the Agency's legal basis – Objective, Scope, Tasks and Areas of Activity – Working, methods and cooperation – Organisation – Operation – Budget and staff – General and Final Provisions – Conclusion

Introduction

The Founding Regulation of the European FRA was finally adopted by the Council of the European Union on 15 February 2007 and its definitive shape was radically affected by several concerns that arose during its drafting process. As already seen, the Member States (such as Germany, Great Britain, the Netherlands and Slovakia) and the Council of Europe were the main opponents to the project of establishing an Agency with full monitoring functions in the field of fundamental rights. The failure of the Constitutional Treaty also did not contribute to create an Agency for fundamental rights with a broad mandate. Without a consolidated constitutional framework, the role of the Agency and its activities were considered properly unfit in relationship to the main institutions of the European Union. Therefore, the Agency began its mandate with a considerable limited remit and without having a legally binding point of reference to the EU Charter of Fundamental Rights. In the meantime, even if the Charter had still not entered in force when the Agency was officially established, it is also interesting to note that the Lisbon Treaty was signed in 2007¹ and the Charter was proclaimed for the second time. Therefore, even though the Agency was created in absence of a legal basis that linked its remit to the Charter, it is also not a coincidence that in the same year essential steps were taken to ensure the entry of the Charter into force, along with a new treaty with amendments inspired by the abandoned Constitutional Treaty². It is also true that the Agency started its man-

¹ The Charter was solemnly proclaimed in Strasbourg one day before the signing of the Lisbon Treaty (13 December 2007) by the European Parliament, the EU Council and the European Commission.

² The Treaty of Lisbon includes most of the institutional and policy reforms which were provided in the Constitutional treaty. However, if the Constitutional Treaty was intended to repeal the founding Treaties of the EU and recast them in a single text, the Lisbon Treaty only amends the founding Treaties. Consequently, the idea of

date before these two instruments were legally binding³ and, as it will be seen, its regulation is the result of this intermediate status. Given these premises in the current chapter the Agency's founding regulation will be analysed, with particular attention to highlight its differences and similarities in comparison to the previews in the Commission proposal (2005)⁴. In here, the implications of the entry in force of the Treaty of Lisbon and the Charter that arose for the FRA's founding regulation and activities will not be tackled. Rather, they will be better addressed in the next Chapter. In the present chapter, the FRA's statute will be discussed in light of the pre-Lisbon constitutional framework in which it was established. The analysis will be conducted following the structure of the regulation from its Preamble to the Final Provisions. On one hand, the result will be a complete account of the framework in which the Agency is called to carry out its work and, on the other hand, it will bring into light some elements of the regulation, which are still controversial, as it will be outlined in the end of this chapter.

The Preamble

Before focusing the attention on the text of the Preamble of the current funding regulation, it seems necessary to briefly outline how the regulation is structured. The Council's Regulation 2007 establishing the FRA consists of 34 articles organized in 7 chapters, which are articulated according to the following order: Subject Matter, Objective, Scope, Tasks and Areas of Activity (Chapter 1), Working Method and Cooperation (Chapter 2), Organization (Chapter 3), Operation (Chapter 4), Financial Provisions (Chapter 5), General Provisions (Chapter 6) and Final Provisions (Chapter 7). It follows the same structure as the Commission proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights 2005. However, the current regulation is the interesting result achieved in light of a debate - involv-

a European Constitution was abandoned and European law is still established by international Treaties: the Treaty on European Union and the Treaty establishing the European Community that was renamed as "Treaty on the Functioning of the EU". For a more detailed analysis of the relation between the Constitutional Treaty and the Treaty of Lisbon, see P. Craig, *The Lisbon Treaty, Law Politic and Treaty Reform*, (OUP 2010), 20,31. S. Griller, J. Ziller (eds), *The Lisbon Treaty, EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 21,56. G. Tsebelis, *Thinking about the Recent Past and Future of the EU*, (2008) 265 J.C.M.S., B. Nascimbene, A. Lang, *Il trattato di Lisbona: l'Unione Europea ad una svolta?*, Il corriere giuridico, 2007. Available at <http://www.forumcostituzionale.it>. A. Lucarelli, A. Patroni Griffi (eds), *Dal Trattato costituzionale al Trattato di Lisbona. Nuovi studi sulla Costituzione europea* (Edizioni Scientifiche Italiane 2009).

³ As already seen, the Agency was established on 15 February 2007 with the adoption of the Council Regulation (EC) No 168/ establishing a European Union Agency for Fundamental Rights whereas the Treaty of Lisbon and also the EU Charter of Fundamental Rights became legally binding on 1 December 2009.

⁴ Commission 'Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights and 'Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union' COM (2005) 280 final (hereinafter Commission Proposal 2005).

ing several institutional actors – that lasted between 2005 and 2007 as already seen in the previous chapter.

1. Setting up a monitoring agency for fundamental rights: four essential elements

Starting from the very beginning of the regulation, it has been noticed that from the first to the seventh *Recital*, the final regulation retraces the wording and the content of the Commission's proposal 2005. In fact, following the spirit of the proposal, the Preamble highlights four elements deeply related to the institution of the Agency.

The first element is art. 6(1) TEU. The Agency is conceived in light of the European Union founding principles, which are liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, which are common values to the Member States⁵. *Recital* (1) aligns the institution of the Agency with the spirit of art 6(1) TEU that was drafted – since the Amsterdam Treaty - in order to trigger a proactive mechanism of protection and promotion of fundamental rights. Indeed, the Agency is clearly seen within the EU framework as an instrument designed to better achieve this purpose.

The second element is the EU Charter of Fundamental Rights that is mentioned as a document which

“reflects the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the social charters adopted by the Community and by the Council of Europe and the case law of the Court of Justice of the European Communities and of the European Court of Human Rights” (*Recital* (2))⁶.

Given the wording of the second *Recital*, it can be supposed, at a first glance, that the Charter should be the main reference point of the work and activities of the Agency. However, since at the time of the adoption of the FRA's regulation the Charter did not have legally binding status, when the Agency was established this reference was merely declamatory. As already seen, such reference was likely inserted considering the future steps of the Constitutional Framework of the Union, which the signature of the Treaty of Lisbon and the second proclamation of the Charter in 2007 foresaw. It also must be said that before being legally binding,

⁵ This is an explicit reference to article 6.1 TEU as laid down in the Consolidate version of the Treaty on European Union [2002] OJ C 325/7.

⁶ FRA Founding Regulation, *Recital* (2), *Preamble*.

the Charter had been already playing a relevant role for the EU institutions, which includes the Agency⁷. In fact, the Agency used the Charter as a reference point of its activities and work, even before it was entered into force⁸.

The third element concerns the Agency's functions and structure. What kind of contribution can offer a monitoring Agency to the Community and the Member States when they are dealing with fundamental rights issues? A monitoring Agency for fundamental rights provides "information and data on fundamental rights matters", ensures "full respect of fundamental rights" and broadens their knowledge and awareness in accordance with one of the common values of the international and European communities which is "the development of effective institutions for the protection and promotion of human right"⁹ (*Recital* (4)). In fact, according to the Commission proposals 2005, the Agency structure was conceived as inspired by two different models from the national human rights institutions and the EU agencies¹⁰. On one hand, the Agency was supposed to combine the model of a National Human Rights Institution (hereinafter NHRI) for the EU with a forum in which collaboration among the existing NHRIs is fostered with the purpose to make more effective the fundamental rights protection in the Union. The Agency, in fact, should have been an independent institution whose Management Board was composed of independent persons "with high level of responsibilities in the management of an independent national human rights institution or with thorough expertise in the field of fundamental rights"¹¹. This feature shows also that the Management Board was conceived as a network of NHRIs and other similar institutions at national level, thus guaranteeing both independence and pluralism. However, according to the principle of enumerated powers, the EU primary law does not consent to create a body empowered of

⁷ O. De Shutter, *The Implementation of the Charter by the Institutions of the European Union*, in S. Peers, T. Hervey, J. Kenner, A. Ward (eds), *The EU Charter of Fundamental Rights* (Hart Publishing 2014), 1627, 1684.

⁸ See for instance FRA Opinion on proposal for a Council Framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes (28/10/2008). Available at <http://fra.europa.eu/en>.

⁹ The governments of member states should "consider, taking account of the specific requirements of each member state, the possibility of establishing effective national human rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions; [they should] draw, as appropriate, on the experience acquired by existing national human rights commissions and other national human rights institutions, having regard to the principles set out in Resolution 48/134 of the General Assembly of the United Nations and in the Vienna Declaration and Programme of Action, adopted in 1993, as well as on the experience acquired by ombudsmen, having regard to Recommendation No. R (85) 13 of the Committee of Ministers; [they should] promote co-operation, in particular through exchange of information and experience, between national human rights institutions and between these institutions and the Council of Europe, in accordance with Resolution (97) 11 of the Committee of Ministers; [they should] ensure that this recommendation is distributed in civil society, in particular among non-governmental organisations". Recommendation No R (97) 14 of the Committee of Ministers of the Council of Europe of 30 September 1997.

¹⁰ See O. De Shutter, *The EU Fundamental Rights Agency: Genesis and Potential*, in K. Boyle, *New Institutions for Human Rights Protection* (OUP 2009), 93, 136.

¹¹ Commission Proposal 2005, art. 11(1).

judicial competencies, as in the case of some NHRIs¹². Therefore, within the Community framework it was decided to establish an Agency resembling the model of a regulatory agency¹³. In particular, FRA appears as a simple regulatory agency that “does not dispose of any powers to issue (binding or otherwise legally relevant) legal acts. ...[In fact] the FRA’s main function is to provide the EU institutions and Member States with reliable and comparable data on fundamental rights”¹⁴.

The fourth and last element is the continuity between the Agency and the previous EUMC (*Recital* (5)). The Agency is not merely build upon the EUMC but its mandate is an extension of the EUMC’s mandate – characterized by information-gathering tasks. As a consequence, it will seen below that, along with its commitment with fundamental rights as laid down in the Charter and other human rights international instruments, the Agency also devotes part of its monitoring activities to phenomena such as racism and xenophobia according to the EUMC’s previous mandate.

2. A restrictive remit for the Agency

One of the results of the compromissory logic characterizing the current founding regulation is the disappearance of the other separate legal act that was included in the Commission proposal - the Council Decision empowering the FRA to pursue its activities in areas referred to in Title VI TEU – enabling the Agency to work also in the area covered by the former Third Pillar. The main opponents to the implementation of this part of the proposal were the EU Council¹⁵, Germany, Great Britain and The Netherlands, due to concerns such as the extension of the FRA’s mandate. Therefore, in *Recital* (8), the Preamble clearly limits the scope of the application of the Agency’s work within the field of Community law excluding from its target the situation from the former Third Pillar. As a consequence, the Agency’s field of action is quite narrow.

Furthermore, the strict contours of the Agency’s remit are remarked in other two Recitals of the Preamble - the 7th and the 13th - by using a different wording. In these *Recitals* it is affirmed that the Agency’s work and activities are circumscribed to the situations concerning

¹² See, J. Wouters, K. Meuwissen, A. S. de Barros, *The European Union and National Human Rights Institutions*, (July 1, 2013). KU Leuven - Leuven Centre for Global Governance Studies Working Paper No. 112. Available at <http://ssrn.com/abstract=2302576> or <http://dx.doi.org/10.2139/ssrn.2302576>.

¹³ See Commission draft institutional agreement on the operating framework for establishing regulatory agencies COM (2005)59 final.

¹⁴ See A. Orator, *The competence entanglements of the EU Fundamental Rights Agency*, in O. Kammerlander (ed.), *Expertenforum SpringerRecht.at* (Springer-Verlag 2011), 124.

¹⁵ Opinion of the Legal Service of the Council of the European Union, Doc. 13588/05.

fundamental rights issues in which the relevant institutions and authorities of the Community and its Member States are implementing Community law. The expression “when implementing Community law” - that appears in another passage of the regulation¹⁶ - recalls the wording of art. 51 of the EU Charter of fundamental Rights, even if the Agency’s field of application is narrower, being limited exclusively to Community Law. In the next Chapter, this analogy between the scope of the Agency and the scope of the Charter as laid down in art. 51 will be reflected upon, and some important reflections as regards the interpretation of the expression “when implementing Community Law”¹⁷ will be conducted. For the moment, it may suffice to say that even though a link between the Charter and the FRA can be certainly seen in those provisions of the regulation determining the Agency’s scope by using the same wording of art. 51 of the Charter and in those where the Charter is explicitly mentioned, the relevant role played by the Charter in the Commission’s proposal 2005 has been softened in the Council Regulation 2007. The final regulation retraces the Commission proposal 2005 when states that the name of the Agency shall reflect the “close connection” with the Charter. On the contrary, with regards to the legal basis of the Agency’s activities, in Recital (9) the reference to the Charter in the meaning of Article 6(2) of the Treaty on European Union is moved to the background, by including another relevant legal instrument such as the Convention on Human Rights and Fundamental Freedoms. This is likely the consequence of two factors such as the failure of the Constitutional Treaty that was supposed to include the Charter and the concerns expressed by the Council of Europe with regards to the Agency’s establishment. As already seen above, the Charter could not be a legal basis for the Agency due to its non-legally binding status. At the same time, the PACE had strongly recommended to include among the reference instruments of the founding regulation *not only the EU Charter of Fundamental Rights* but also the European Convention of Human Rights, along with other international human rights instruments¹⁸.

Another relevant feature characterizing the Agency’s mandate is that it was also conceived as continuing the previous EUMC. The Agency indeed does not merely extend the mandate of the existing EUMC but has to be built upon it. This means that among its tasks, it is mainly important that the Agency continues to cover the phenomena of racism, xenophobia and anti-Semitism, which were previously monitored by the EUMC (see *Recital* No 10). Comparing the

¹⁶ FRA Founding Regulation, art. 3 (1).

¹⁷ See A Bogdandy, J. Bernstorff, *The EU Fundamental Rights Agency within the European and International Human Rights Architecture: The Legal Framework and some Unsettled Issues in a New Field of Administrative Law*, (2009) 46 C.M.L.R., 1064.

¹⁸ PACE Resolution 1427 (2005) Plans to set up a fundamental rights agency of the European Union, adopted 18 March 2005.

formulation of the tenth Recital of the Founding Regulation to the respective one laid down in the Commission proposal (see the *Recital* No 7 of the Commission proposal 2005), if the latter mentioned a general commitment of the Agency in assisting the relevant institutions of the Community in the field of fundamental rights protection, the final version of the Preamble is more specific about which phenomena the work of the Agency should cover. In fact, the Agency has to carry out the EUMC's commitment with the phenomena of "racism, xenophobia and anti-Semitism, the protection of the rights of persons belonging to minorities, as well as gender equality, *by considering them essential elements for the protection of fundamental rights*"¹⁹. Therefore, if the centrality of the Charter as a reference instrument for the activities of the Agency is decreased in the Preamble of the final Regulation, at the same time it is specified and remarked the Agency's commitment is with all form of discriminations, as it is expressed in the tenth *Recital*. As it will be seen, a considerable part of the FRA's activities are focused on these phenomena and intersect those activities properly devoted to the rights included in the Charter.

The limits of the Agency's work are also specified in the thematic areas laid down in the MAF²⁰. The MAF, that is the other relevant element of the Agency's legal framework, was only generally mentioned in the Preamble of the Commission Proposal 2005. In fact, if a full *Recital* - the 11th - of the Preamble of the current founding regulation is devoted to the FRA's MAF, the Commission proposal 2005 mentioned the MAF in the same paragraph where Art. 6(2) of the Treaty on European Union and the Charter of Fundamental Rights were addressed as sources for the Agency's work. The final version of the FRA's Preamble specifies that the MAF needs to be adopted by the European Council after consulting the European Parliament on the basis of a Commission proposal. This engagement of the EU relevant institutions in the MAF's adoption procedure clearly shows, since the very beginning of the Regulation, the political importance of this legal basis for the Agency's activities²¹.

3. Three main tasks

After having taken into account the Agency's framework and remit, the Preamble mentions the main tasks of the Agency's work. Firstly, the Agency "collects objective, reliable and com-

¹⁹ FRA Founding Regulation, Recital (10), *Preamble*.

²⁰ In fact, "The thematic areas of activity will be defined through a Multiannual Framework determined by an implementing regulation involving the politically accountable Community institutions, thus setting limits for the Agency's work". COM (2005) 280 final.

²¹ An analysis of the MAF will be conducted in the next chapter.

parable information on the situation of fundamental rights, analyses information in terms of causes of disrespect, consequences and effects and examines examples of good practice in dealing with these matters” (*Recital* (12)). Secondly, the Agency can deliver opinions to the Union’s institutions and to the Member States “when implementing Community law”. As pointed out above and analysed in the next chapter, this *Recital* (the 13th) is another passage of the regulation where a relationship with the field of application of the EU Charter of fundamental rights as expressed in art. 51. can be recognized. Furthermore, the Agency can formulate opinions “on its own initiative or at request of the European Parliament, the Council or the Commission, without interference with the legislative and judicial procedures established in the Treaty”²². However, the institutions can request opinions on their legislative proposals or positions in the course of the legislative procedures when they are dealing with fundamental rights matters. It has also to be noticed that the Council regulation 2007 no longer includes the *Recital*, providing the possibility for the EU Council to request the Agency’s technical expertise “in the context of proceedings commenced under article 7 of the Treaty on European Union”²³. The extension of the Agency’s mandate also to the field of application of article 7, would have meant that the Agency could monitor the compliance of Member States with fundamental rights and others EU values, as drawn up in art. 6 TEU, without restrictions to EC or EU laws²⁴. Therefore, it is comprehensible why this provision gave rise to a lot of concerns among the EU Member States²⁵, of the Legal Service of the Council of the Union²⁶ and within the Council Ad hoc Working Party on Fundamental Rights and Citizenship²⁷. Especially since this provision would have attributed to the Agency a role that could go beyond the EC/EU competencies. As a consequence, the final regulation 2007 omits the provision concerning the role of the Agency with regards to art. 7 TEU but also annexes a Declaration of the Council, leaving open the possibility for itself to rely on the Agency’s expertise in cases covered by art. 7 TEU²⁸. The Preamble continues by introducing other tasks of the Agency as the collection of an annual report on fundamental rights issues covered by the areas of the Agency’s activity and including examples of good practice and the thematic reports on topics of particular importance to the Union’s policies (*Recital* (14)).

²² See FRA Founding Regulation, *Recital* (13), *Preamble*.

²³ See Commission proposal 2005, *Recital* (12), *Preamble*.

²⁴ COM (2005)59 final.

²⁵ See the explanatory memorandum annexed to the Commission proposal 2005.

²⁶ Doc. 13588/05JUR 425 JAI 363 COHOM 36 (26 October 2005).

²⁷ Doc. 15033/06 LIMITE JAI 578 CATS 165 COHOM 162 COEST 311 (10 November 2006).

²⁸ “The Council considers that neither the Treaties nor the Regulation establishing the European Union Agency for Fundamental Rights preclude the possibility for the Council to seek assistance of the future European Union Agency for Fundamental Rights when deciding to obtain from independent persons a report on the situation in a Member State within the meaning of Article 7 TEU when the Council decides that the conditions of Article 7 TEU are met”. Doc. 6166/07 LIMITE JAI 67 CATS 12 COHOM 15 COEST 39 (12 February 2007).

Last but not least, the Agency - in accordance with the model of NHRIs with consultative and advisory functions²⁹ - is called to carry out the task to raise awareness of the general public about their fundamental rights, and about the possibilities and different mechanisms for enforcing them in general. However, this commitment does not mean that the Agency should deal itself with individual complaints (*Recital* (15)). As shortly outlined above, these three fundamental tasks of the FRA correspond to the respective tasks characterizing the model of simple regulatory agencies or information agencies, which have no power to issue legal acts³⁰. However, in the next chapter it will be seen whether or not the opinions of FRA are capable of influencing the European decision-making process.

4. From the multilevel cooperation to the Agency's legal basis

At this point of the Preamble, from *Recital* (16) onwards the focus of the regulation concerns the Agency's multilevel cooperation and collaboration. Therefore, the Agency should "closely work with all relevant institutions as well as the bodies, offices and agencies of the Community and the Union in order to avoid duplication, in particular regarding the future European Institute for Gender and Equality". Secondly, in order to achieve a better cooperation between the Agency and the Member States, the 17th Recital provides that each Member State should nominate National Liaison officers who are informed by the Agency with regards to its reports and other documents. This Recital was absent in the Commission proposal 2005 and is likely the result of the Member States' concern as regards to the role they played within the commission proposal. Thirdly, and perfectly aligned with the recommendations made by the PACE in the Resolution 1427 (2005), the Agency has also to carry out a close collaboration with the Council of Europe in order to avoid any overlap between the activities of the Agency and those of the Council of Europe. This could be better achieved by "elaborating mechanisms to ensure complementarity and added value, such as the conclusion of a bilateral coop-

²⁹ "Consultative commissions tend to have a very broad membership, with participation from many segments of society. While they have the authority to both protect and promote human rights, not all may investigate individual complaints. Consultative commissions tend to focus on advising the Government on major human rights issues and reporting on particularly significant problems. They can only make recommendations and tend to have broad research and advisory mandates across the full range of human rights recognized by the State, but do not generally have the authority to entertain or investigate individual complaints". See *National Human Rights Institutions, History, Principle, Roles and Responsibilities*, United Nations, New York and Geneva 2010. Available at http://www.ohchr.org/Documents/Publications/PTS-4Rev1-NHRI_en.pdf.

³⁰ See the taxonomy in A. Orator, *Empowering European Agencies: Perspectives and limits of European democratic legitimacy*, in H. Eberhard et al. (eds), *Perspectives and Limits of Democracy, Proceedings of the 3rd Vienna Workshop on International Constitutional Law* (Nomos Facultas 2008), 23.

eration agreement”³¹ and by ensuring the participation of an independent person appointed by the Council of Europe in the Management Board of the Agency with voting rights (*Recital* (18)). Finally, a further step to ensure good cooperation at different levels is the promotion of a dialogue with the civil society and working closely with non-governmental organisations and with institutions of civil society committed to fundamental rights matters. To this purpose, the Agency has to set up a cooperation network called the “Fundamental Rights Platform” favouring a structured and fruitful dialogue and close cooperation with all relevant stakeholders (*Recital* (19)).

With regards to the structure of the Agency, the Preamble mentions only the Management Board composed by independent experts who are appointed by each Member State according to the criteria drawn up in the Paris Principles³² and in the Scientific Committee setup, in order to ensure the high level work of the Agency (*Recitals* (20) (21)).

Always in light of the Paris principles, the *Recital* (23), recognizing the importance of role performed by the European Parliament’s in the field of fundamental rights, calls for the involvement of such institutions in the activities of the Agency, in the adoption of the Agency’s MAF and in the selection of the candidates proposed as Director of the Agency³³. However, the Commission Proposal 2005 envisaged that the Parliament could also appoint an independent person as a member of the Management Board of the Agency. This provision is omitted in the current regulation that attributes more relevance to the presence of an independent person appointed by the Council of Europe and of two representatives of the European Commission in the Management Board.

The Agency must have, indeed, a legal personality and succeed the EUMC with regards to not only its activities and work but also to all legal obligations, financial commitments or liabilities carried out by the Centre or agreements made by the Centre, as well as the employment contracts with the staff of the Centre. It also envisages the participation of Candidate countries and countries where a Stabilisation and Association agreement has been concluded. This opportunity offers these countries to be supported in their efforts towards European integration. Especially “facilitating a gradual alignment of their legislation with Community law

³¹ FRA Founding Regulation, *Recital* (18), *Preamble*.

³² See Principles relating to the Status of National Institutions (The Paris Principles) Adopted by General Assembly resolution 48/134 of 20 December 1993. Available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatusOfNationalInstitutions.aspx>.

³³ The FRA is one of the 13 Agencies, which were established without an involvement of the European Parliament as co-legislator. According to art. 308 TEC, the European Parliament had played only a consultative role in the founding procedure. However, it is worthy to note that among these 13 Agencies, exceptionally FRA is one of the four Agencies whose founding regulation provides parliamentary hearings for candidates proposed as its Director. This is probably due to the prominent role played by the European Parliament in the field of fundamental rights protection. See M. Scholten, *The Political Accountability of EU and US Independent Regulatory Agencies*, (Martinus Nijhoff Publishers 2014), 72, 74.

as well as the transfer of know-how and good practice”³⁴.

Interestingly, *Recitals* (30) and (31) are identical to the respective Recitals laid down in the Commission proposal with regards to the legal basis for establishing the Agency and the subsidiarity-proportionality test. In doing so, the regulation remains silent with regards to the criticisms that the Council of Europe arose upon these provisions. In fact, alike the Commission proposal, the current regulation chooses as legal basis for the creation of the Agency the art. 308 TEC that follows as

“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures”³⁵.

As a consequence, *Recital* (31) states that

“The contribution made by the Agency to ensuring full respect of fundamental rights in the framework of Community law is likely to help achieve the Community's objectives. With regard to the adoption of this Regulation, the Treaty does not provide for powers other than those set out in Article 308”³⁶.

However, at the time of the adoption of this regulation fundamental rights were not considered among the objectives of the European Community³⁷ and both the Commission proposal and the current regulation do not provide explanations with respect to what the treaty objectives of the Agency should have fostered.

Even the subsidiarity and proportionality principles are subjected to the same treatment. The regulation justifies its compliance with the principle of subsidiarity by explaining: “the provision of comparable and reliable information and data at European level cannot be fully achieved by the Member States”³⁸. Effectively, at the time of the establishment of the Agency not all the Member States had set up NHRIs able to assist them in protecting fundamental rights at national level. However, all the EU Member States were already engaged with fundamental rights within the system of the Council of Europe and by participating in the activities of other international organizations. Therefore, at the time of the Commission proposal the Council of Europe and some Member States considered such argument as lacking in

³⁴ FRA Founding Regulation, Recital (28), *Preamble*.

³⁵ Art. 308 TEC (now 352 TFEU),

³⁶ FRA Founding Regulation, Recital (31), *Preamble*.

³⁷ See Opinion 2/94, Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996], E.C.R. I-01759.

³⁸ FRA Founding Regulation, Recital (30), *Preamble*.

transparency and clarity as the proportionality argument³⁹. Furthermore, it certainly has to be seen how this framework has reacted to the entry in force of the Lisbon Treaty and the Charter, with new distributions of competences and the fundamental rights among the objectives, which the Union has to pursue, but this matter will not be tackled in this chapter.

Objective, Scope, Tasks and Areas of Activity

The primary mission of the Agency is to assist the relevant European Union institutions, offices, bodies and agencies and Member States “when implementing Community Law” by offering advisory and expertise support in the field of fundamental rights protection.

This objective has to be achieved by setting up specific measures within the competences of the Community (according to the Treaty establishing the European Community). In doing so, the Agency has to drive attention to fundamental rights as laid down in the Treaty on European Union (see art. 6(2) TEU).

FRA’s scope of application is defined in article 3 of the current founding regulation by stating that:

“1. The Agency shall carry out its tasks for the purpose of meeting the objective set in Article 2 within the competencies of the Community as laid down in the Treaty establishing the European Community.

2. The Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty on European Union.

3. The Agency shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law”⁴⁰.

As it can be noticed the final version of art. 3 does not present any reference to the EU Charter of fundamental rights as the Commission proposal 2005 clearly does. This is likely due to the ambiguous status of the Charter at the time of the establishment of the Agency. As already seen, the Charter was a political document until 2009 when it became legally binding along with the entry in force of the Lisbon Treaty. Therefore, it might be seen as inappropriate to make a reference to a political source rather than a legal one in the part of the Founding Regulation devoted to determine the legal basis of the Agency’s work. Furthermore, at the time of

³⁹ See W. Hummer, *The European Fundamental Rights Agency*, in A. Reinich, U. Kriebaum (eds), *The law of international relations – Liber amicorum Hanspeter Neuhold* (Eleven International Publishing 2007). D. Geradin and N. Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, in P. Eeckhout and T. Tridimas (eds), *Yearbook of European law*, (2005 OUP), 137,197.

⁴⁰ FRA Founding Regulation, art. 3.

the Commission proposal 2005, it was criticized that the draft regulation, by making reference to the Charter concerning the scope of the Agency's activity, was anticipating a legal basis that was yet not legally binding. The European Commission's decision to word the paragraph in the following way - "the Agency shall refer in carrying out its tasks to fundamental rights as defined in Article 6(2) of the Treaty of the European Union and as set out in particular in the Charter of Fundamental rights of the European Union as proclaimed in Nice on 7 December 2000" - was seen as a political signal of the Charter's appreciation⁴¹.

Another passage of this article presents difficulties of interpretation that are not negligible. The expression "when implementing Community law" in paragraph 3 does not permit a clear understanding of its "exact legal contours"⁴². Gabriel Toggenburg points out the narrow scope of FRA's mandate by stating that this expression means that "any action on the part of States which are not related to implementing EC law are outside the Agency's remit". Such restriction is strongly related to the wording of art. 51 of the EU Charter of Fundamental Rights regarding its scope of application. However, if on one hand the Charter had not legally binding status at the time of the adoption of the FRA's founding regulation, even after the entry into force of the Lisbon Treaty, as it will be seen in the next chapter, the interpretation of art. 51 made by the European Court of Justice and by its commentators is controversial. Accordingly, it is not clear if also the contours of art. 3(3) of the Agency's regulation are as strict as they look. This lack of specificity certainly corresponds to a lack of certainty with regards to the scope of FRA's mandate.

Consequently, also the Agency's tasks, as they have been defined in art. 4 of the 2007 Council Regulation are determined in light of the same compromised logic shaping its field of application. This clearly appears evident when we compare the wording of art 4 in the Agency's current founding regulation with art. 4 as drafted in the Commission proposal 2005. There are three major differences: the insertion of the Council of Europe among the institutions which communicate to the Agency the results of their monitoring and research activities; the restriction of the subject matter of the Agency's opinions and conclusions to specific thematic topics; the disappearance of the paragraph concerning art. 7 of the Treaty on European Union. In other words, the Agency retraces the model of a simple regulatory⁴³ Agency without any power to issue legal acts. It is in fact responsible to "collect, record and disseminate rele-

⁴¹ J.M. Schlichting and J. Pietsch, *Die Europäische Grundrechte-agentur. Aufgaben – Organisation – Unionskompetenz*, (2005) 19 EuZW, 587, 589.

⁴² COM (2005) 59 final.

⁴³ See A. Orator, *Empowering European Agencies: Perspectives and limits of European democratic legitimacy*, in H. Eberhard et al. (eds), *Perspectives and Limits of Democracy*, Proceedings of the 3rd Vienna Workshop on International Constitutional Law (Schriften zum Internationalen und Vergleichenden Öffentlichen Recht, Band 4), (Nomos Facultas 2008), 23,40.

vant, objective, reliable, and comparable information and data”⁴⁴. It has also to “develop methods and standards to improve the comparability, objectivity and reliability of data at European level, in cooperation with the Commission and the Member States”⁴⁵. It is responsible to “carry out, cooperate and encouraging scientific research and surveys, preparatory studies and feasibility studies, including, where appropriate and compatible with its priorities and its annual work programme, at the request of the European Parliament, the Council or the Commission”⁴⁶ and “formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law either on its own initiative or at request of the European parliament, the Council or the Commission”⁴⁷. Once again the regulation uses the expression “when implementing Community law”. The task to deliver opinions and conclusions for the relevant EU institutions and the Member States, as Andreas Orator has clarified, does not mean that the FRA holds “genuine decision-making power”⁴⁸. However, it remains uncertain the limit of the scope of the Agency’s activities and also it has to be established whether or not the Agency is really not involved in the decision making process in its work.

Furthermore, every year the Agency publishes an “annual report on fundamental-rights issues covered by the areas of the Agency’s activity, also highlighting examples of good practice”⁴⁹ as well as a number of thematic reports based on its analysis, research and surveys. Finally, the Agency is also responsible to draft and publish an annual report on its activities and to develop a communication strategy and promote dialogue with civil society.

The borders of the Agency’s activity are further determined in paragraph 2 of article 4. It specifies that the conclusions, opinions and reports delivered by the Agency may concern proposals from the Commission (under 250 TEC) or positions taken by the institutions in the course of legislative procedures only where a request by the respective institution has been made. However, FRA does not deal either with the judicial review of the relevant EU institutions’ acts (art. 230 TEC) or with the emergency protection measures concerning Member States within the meaning of article 226 (TEC).

FRA’s areas of activity are determined in the MAF, which the Council adopts after considering the Commission’s proposal and also after consulting the EU Parliament. During the drafting process of the framework the Commission also has to consult the Agency’s Manage-

⁴⁴ FRA Founding Regulation, art. 4(a).

⁴⁵ FRA Founding Regulation, art. 4(b).

⁴⁶ FRA Founding Regulation, art. 4(c).

⁴⁷ FRA Founding Regulation, art. 4(d).

⁴⁸ A. Orator, *supra* note 14.

⁴⁹ FRA Founding Regulation, art. 4(e).

ment Board.

The framework covers five years and defines the thematic areas of FRA's work. Among its thematic areas FRA must have the fight against racism, xenophobia and related intolerance. The Commission's proposal 2005 committed the Agency's activity only with the fight against racism and xenophobia. By extending this area also to "related intolerance", it is clear that the FRA's margin of action is wider.

It also has to be aligned with the EU Council and the EU Parliament's orientations concerning fundamental rights as it is expressed respectively in their resolutions and conclusions.

The framework concerns the Agency's financial and human resources and includes provisions aimed to avoid an overlap with the remit of other community bodies, offices and Agencies and with the Council of Europe – consistently with its claims and criticisms – and other international organizations active in the field of human rights.

Therefore the Agency is called to implement its tasks within the thematic areas as they are defined in the MAF. However, at request of the three relevant EU institutions, FRA's work may go beyond the thematic areas as determined in the MAF but always within EU competence⁵⁰.

Finally, the Agency has to carry out its activities according to the financial and human resources available in light of its annual work program, which is the annual further implementation of the Agency's mandate.

Working, methods and cooperation

How can the Agency ensure the provision of objective, reliable and comparable information? Certainly the FRA has to rely on the expertise of several organizations and bodies in each Member State and also it needs to involve national authorities in the collection of data. To this aim it is called to set up and coordinate information networks and use existing networks, organize meetings of external experts and set up ad hoc working parties whenever necessary.

In doing so, the Agency has to work complementarily with the other organizations. Originally, the Commission proposal 2005 mentioned only Community and Member States' institutions, bodies, offices and agencies and the Council of Europe as well as international organizations. The final regulation is more specific. Regarding the Council of Europe, the Agency in

⁵⁰ G. N. Toggenburg, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?* (December 2013). EUI Department of Law Research Paper No. 13. Available at <http://ssrn.com/abstract=2368194> or <http://dx.doi.org/10.2139/ssrn.2368194>. See also G. N. Toggenburg, *Exploring the Fundament of a New Agent in the Field of Rights Protection: The F(undamental) R(ights) A(gency) in Vienna*, (2007) 8/7 EYMI, 624, 626.

particular has to consider the findings and activities of the Council's of Europe monitoring mechanism and of the Council of Europe Commissioner for Human Rights. Furthermore, among the international organisations, the regulation makes an explicit reference to the Organization for security and Cooperation in Europe (OSCE), the United Nations.

The Agency can also make contractual and sub-contractual agreements with other organizations for the purpose of carrying out its tasks and can award grants to implement cooperation among national, European and international organizations.

In terms of relationships with the relevant Community bodies, offices and agencies, the FRA has to ensure appropriate coordination by laying down memoranda of understanding.

Then, the final regulation modulates the Agency's cooperation activity on three levels.

The first is the cooperation with organizations at Member States and international level. A close cooperation with each member state should be granted by nominating a National Liaison Officer who is a government official appointed by the Member State. The National Liaison Officer is the main contact point for the Agency in the Member State and this Officer can submit opinions on the draft Annual Work Programme to the Director prior to its submission to the Management Board. At the same time, the Agency has to communicate to the National Liaison Officers all documents that have been drafted. More generally, the Agency has to cooperate with governmental organizations and public bodies in the field of fundamental rights in the Member States including national human rights institutions. Finally, among the other international organizations it is explicitly mentioned the Organization for Security and Cooperation in Europe (OSCE), especially the Office for Democratic Institutions and Human Rights (ODIHR), the United Nations and other international organizations. These administrative arrangements have to comply with Community law and have to be adopted by the Management Board on the base of the draft submitted by the Agency's Director after the Commission has delivered an opinion. If the Commission expresses its disagreement with these arrangements the Management Board shall re-examine and adopt them by a two-thirds majority of all members.

The second level is the cooperation with the Council of Europe. As already seen the Agency has to cooperate in its activities with the Council of Europe and in particular with regards to the Annual Work Programme and to the cooperation with civil society. The cooperation between the Agency and the Council of Europe is regulated by an agreement established by the Community under Article 300 TEC procedure. The agreement has to include the appointment of an independent person by the Council of Europe in the Management Board of the Agency and its executive Board. In the final regulation, the presence of the Council of Eu-

rope representatives in the FRA's internal bodies is reinforced and remarked by comparison with the Commission Proposal 2005. It is clear the role-played by the Council of Europe after the European Commission presented the proposal for a Council Regulation establishing the FRA influenced and shaped its final version.

Finally, the third level is the cooperation with civil society. The cooperation with civil society was not really developed in the Commission proposal 2005. Rather, in the current regulation the cooperation with civil society and the establishment of a Fundamental Rights Platform, it is more articulated and defined. In other words, the Agency has to cooperate with non-governmental organizations and with institutions of the civil society working in the field of fundamental rights and combating racism and xenophobia at national, European or international level. To this aim, the FRA is responsible to set up a cooperation network under the authority of the Director – Fundamental Rights Platform (hereinafter FR Platform) – composed of non-governmental organizations dealing with human rights, trade unions and employer's organizations, relevant social and professional organizations, churches, religious, philosophical and non-confessional organizations, universities and other qualified experts of European and international bodies and organizations. The FR Platform is a mechanism for exchanging information and sharing knowledge and ensures cooperation between the Agency and the stakeholders. All interested and qualified stakeholders dealing with fundamental rights can participate in the Platform. The Agency can request the FR Platform to make a suggestion to the Management Board on the Annual Work Programme to be adopted; to give feedback and suggest follow up to the Management Board on the annual report; to communicate outcomes and recommendations of conferences, seminars and meetings relevant to the work of the Agency to the Director and to the scientific committee.

Organisation

The Agency's structure is organized in four bodies: the Management Board, the executive board, the scientific committee and the Director. In the Commission proposal 2005, the scientific committee was not included among the Agency's bodies. Rather the Fundamental Rights Forum (now Fundamental Rights Platform) was considered as an Agency's body. As seen previously in the final regulation, the Fundamental Rights Platform is the mechanism set up to implement the third level of the FRA's cooperation activities between the Agency and the civil society.

The *Management Board* is composed of highly qualified persons in the field of fundamental

rights and the management of public or private sector organizations. The Management Board is composed of 28 independent persons appointed by each Member State, one independent person appointed by the Council of Europe and two representatives of the Commission. Once again, in the final regulation there is no reference of an independent person appointed by the European Parliament as it was in the Commission proposal 2005. Each member of the Management Board has an alternate member as its representative appointed by the same procedure.

The term of their office last five years and is not renewable. Their office can end before five years only if the members resign or if they do not meet the criteria of independence⁵¹.

Among its functions, the Management Board is responsible to elect the Chairperson and the Vice-Chairperson and the other two members of the executive Board among its members. It also should be the Agency's planning and monitoring body accountable for:

1. Adopting the Agency's Annual Work Programme in accordance with the MAF. The Agency's Director submits to the Management Board a draft of the Annual Work Programme after the Commission and the Scientific Committee have delivered an opinion on it. The Annual Work program also has to be transmitted to the European Parliament, the Council and the Commission;
2. Adopting annual reports and comparing them with the objectives of the Annual Work Programme. The Scientific committee has to be consulted before adopting the annual report on fundamental-rights issues. Finally, the reports have to be transmitted not later than 15 June to the European Parliament, the Council, the Commission, the Court of Auditors, the European Economic and Social Committee and the Committee of the Regions;
3. Appointing and dismissing the Agency's Director in case of necessity;
4. Adopting the annual draft and final budgets of the Agency;
5. Exercising the powers conferred on appointing authority by the Staff Regulations of officials of the European Communities and on the authority entitled to conclude contracts by the Conditions of Employment according to Article 24(2) of the Founding Regulation in respect of Director and disciplinary authority over the Director;
6. Drafting an annual estimate of expenditure and revenue for the Agency and deliver it to

⁵¹ In the second case, the member of the Management Board has the duty to inform the Commission and the Director of the Agency. Then "The party concerned shall appoint a new member or a new alternate member for the remaining term of office. The party concerned shall also appoint a new member or a new alternate member for the remaining term of office, if the Management Board has established, based on a proposal of one third of its members or of the Commission, that the respective member or alternate member no longer meets the criteria of independence. Where the remaining term of office is less than two years, the mandate of the new member or alternate member may be extended for a full term of five years". FRA Founding Regulation 2007, art 12 (4).

the Commission;

7. Adopting the Agency's rules of procedure on the basis of the draft submitted by the Director after the Commission, the Scientific Committee and the independent appointed by the Council of Europe have delivered an opinion;
8. Adopting the financial rules applicable to the Agency on the basis of the draft submitted by the Director after the Commission has delivered an opinion;
9. Adopting the necessary measures to implement the Staff Regulations of officials of the European Communities and the Conditions of Employment of other servants of the European Communities;
10. Adopting the arrangements on transparency and access to documents;
11. Appointing and revoking the members of the Scientific Committee;
12. Establishing that a member or an alternate member of the Management Board no longer meets the criteria of independence.
13. The Management Board may delegate its responsibilities to the Executive Board only concerning the preparation of the annual estimate of expenditure and revenue for the Agency, the adoption of the necessary measures to implement the staff regulation of officials of the European Communities and the Condition of Employment of other servants of the European communities and of the arrangements on transparency and access to documents.
14. Decisions by the Management Board are taken by a simple majority of the votes cast only regarding the preparation of the annual estimate of expenditure and revenue for the Agency, the adoption of the final rules applicable to the Agency on the basis of the draft submitted by the Director, the adoption of the necessary measures to implement the staff regulation of officials of the European Communities and the Condition of Employment of other servants of the European communities and of the arrangements on transparency and access to documents. With regards to other matters, the Management Board requires two-thirds majority of its members vote. Furthermore, the decisions related to which internal language has to be adopted require the voting unanimity of the Management Board. Each member of the Management Board, or in his or her absence his or her alternate, have one vote. The Chairperson has the casting vote. With regards to the person appointed by the Council of Europe, he or she may vote on decisions referred to the adoption of the Annual Work Program, the annual reports and the appointment and the revocation of the members of the Scientific Committee.

The Chairperson convenes the Management Board twice a year. In case of extraordinary meetings, the Chairperson convenes them on his or her own initiative or at the request of at least one third of the members of the Management Board.

The meetings of the Management Board are also open to specific observers as the Chairperson or Vice-Chairperson of the Scientific Committee and the Director of the European Institute for Gender Equality. The Executive Board can also invite to attend the meeting the Directors of other relevant Community agencies and Union bodies as well as of other international bodies mentioned in the regulation.

The Chairperson, the Vice-Chairperson and two members of the Management Board elected by the Management Board and one of the two representatives of the Commission in the Management Board compose the *Executive Board*. It is also worth noting that the person appointed by the Council of Europe in the Management Board can participate in the meetings of the Executive Board. This is another addition, which shows how the concerns expressed by the Council of Europe affected the final version of the Regulation. The Executive Board supports the Management Board activities and has been convened by the Chairperson whenever necessary to prepare the decisions of the Management Board and to assist and advise the Director.

The *scientific committee* was not properly regulated in the commission proposal 2005. Rather, the current founding regulation devotes to it art. 14. This Agency's body should guarantee the scientific quality of the Agency's work. It is composed of eleven independent persons highly qualified in the field of fundamental rights. The Management Board appoints them, after having consulted a committee of the EU Parliament throughout a procedure consisted of a call for applications and a selection process. However, the Members of the Management Board cannot be members of the scientific committee. The scientific committee is formed ensuring a balanced geographical representation. The term of the office of its members is five years and it is not renewable. The members of the scientific committee can be replaced only on their own request and in case they are not anymore able to fulfil their duties. In case a member of the scientific committee does not meet the criteria of independence, he or she has to inform the Commission and the Director of the Agency. Otherwise, one third of the Members of the Commission or of the Management Board can revoke one of the members of the scientific committee by declaring a lack of independence. In this case the Management Board has to re-appoint a new member of the committee. The scientific committee elects its Chairperson and Vice-chairperson for a term of office of one year. The Director involves the scientific committee in the preparation of documents concerning the collection and analysis of reliable and

comparable information data, the development of methods and standards of analysis and comparability, carrying out and cooperating with and encouraging scientific research, surveys, preparatory studies and feasibility studies, the formulation and publication of conclusions and opinions on specific thematic topics, the publication of the annual reports, the thematic reports, the development of a communication strategy and the promotion of a dialogue with the civil society. The scientific committee pronounces itself by a two third majority and the Chairperson convenes it four times per year. The Chairperson launches a written procedure or convenes extraordinary meetings on his or her own initiative or at request of at least four members of the Scientific Committee.

The Agency's *director* is appointed for a term of office of five years by the Management Board on the basis of its experiences and merits in the field of fundamental rights and his or her administrative and management skills. The Director is selected on the basis of a list drafted by the Commission after a call for candidates. Before making the appointment the candidates must address the Council and the competent European Parliament Committee. Then the EU Parliament and the Council of the EU deliver their opinion and their preference. Finally, the Management Board appoints the Director taking into account these opinions.

Nine months before the end of the Director's office, the Commission evaluates the performance of the Director and the Agency's duties and requirements in the coming years. The Management Board, on the proposal of the Commission and taking into account the evaluation report, can extend the term of office of the Director once and not for more than three years. It also has to inform the European parliament and the Council about its intention to extend the Director's mandate. This is the case of the current Director of the FRA, Morten Kjaerum, who was appointed in 2008 after having been the founding Director of the Danish Institute for Human Rights, Denmark's national human rights institution. After five years of mandate, his office was extended for other three years by decision of the Management Board and it will end in June 2015.

The Director's accountability concerns the preparation and publication of documents in accordance to art. 4 of the regulation, the preparation and implementation of the Agency's annual work program, all staff matters, administrative matters, the implementation of the Agency's budget, the implementation of the effective monitoring and evaluation procedure relating to the performance of the Agency (the Director shall report annually to the Management Board regarding the findings of this monitoring system), the cooperation with the National Liaison Officers, the cooperation with civil society, including coordination of the Fundamental Rights Platform. The Director performs his or her tasks independently and he or

she can be convened by the Parliament or by the Council to attend a hearing on any matter linked to the Agency's activities. Finally, the director can participate in the executive board meeting but with no voting rights.

Operation

The FRA is an independent Agency that carries out its tasks in complete independence (See independent Regulatory Agencies).

The members of its bodies (Management Board, Executive Board, Scientific Committee, Director) are called to act in the public interest. Therefore, they formalized this commitment through a statement of interests to be published on the Agency's website. They draft the statement when they take their office and revise it in case their interests were changed.

Concerning the Agency's activities, they are covered by the principles of transparency and openness under the *Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*⁵². After the launch of the Agency, the Management Board had six months for implementing these principles by adopting specific rules, which include: the openness of meetings, the publication of the work of the Agency, including the work of the scientific committee, and arrangements to implement the *Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents*⁵³. With regards to the Regulation (EC) No 1049/2001 and according to art. 195 and art. 230 TEC, when the Agency is acting under art. 8 it is possible to lodge a complaint with Ombudsman or to appeal to the European Court of Justice against the Agency⁵⁴.

The Agency's activity is also covered by the *Regulation (EC) No 45/2001 of the European Par-*

⁵² Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council.

⁵³ Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.

⁵⁴ Article 8 of the regulation entitled "Processing of confirmatory applications" states

1. A confirmatory application shall be handled promptly. Within 15 working days from registration of such application, the institution shall either grant access to the document requested and provide access in accordance with Article 10 within that period or, in a written reply, state the reasons for the total or partial refusal. In the event of a total or partial refusal, the institution shall inform the applicant of the remedies open to him or her, namely instituting court proceedings against the institution and/or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively.

2. In exceptional cases, for example in the event of an application relating to a very long document or to a very large number of documents, the time limit provided for in paragraph 1 may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

3. Failure by the institution to reply within the prescribed time limit shall be considered as a negative reply and entitles the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman, under the relevant provisions of the EC Treaty.

liament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data.

Finally, according to art. 195 TEU, the Ombudsman supervises the administrative activities of the Agency. Since its establishment in 2007, the Agency has been lodged with the Ombudsman eight times and the Ombudsmen closed three cases involving claims against the FRA concerning Administration and Staff Regulations and Institutional and policy matters⁵⁵.

Budget and staff

The Agency every year draws up estimates of all of its revenue and expenditure, which are included in its budget. According to art. 20 (2) of the Founding Regulation, the budget shall display a balance between the revenue and the expenditure of the Agency. The Agency's revenue includes a subsidy from the Community recorded in the general budget of the European Union (Commission Section) but it can also consider other resources. According to the legislative financial statement, included in the Commission proposal 2005, the financial planning envisaged a subsidy amounting to approximately € 16 million for the year 2007 that would have gradually been increased until 2013 to the amount of € 29 million⁵⁶. However, although the Agency was established in 2007, it was not fully operational until 2008. According to the general budget of the European Union for the financial year 2008⁵⁷ - within the section devoted to the European Commission – the Agency commences its mandate counting on a subsidy amounting of € 15 million⁵⁸.

When the Agency draws up its annual budgetary record, the revenue may have in addition the account of the payments received for services rendered in the framework of the implementations of the Agency's tasks (art.4) and a financial contribution from international organizations, the candidate countries and the Member States (articles 8, 9 and 28); while the Agency's expenditure has to include staff remuneration, administrative and infrastructure costs and operating expenses.

⁵⁵Decision of the European Ombudsman on complaint 2209/2007/VIK against the European Union Agency for Fundamental Rights, 20/05/2008; Decision of the European Ombudsman concerning complaint 1933/2011/DK against the European Union Agency for Fundamental Rights, 25/01/2012; Decision of the European Ombudsman closing the inquiry into complaint 565/2012/ER against the European Union Agency for Fundamental Rights, 02/04/2014. Available at <http://www.ombudsman.europa.eu>.

⁵⁶ Indicative financial planning should have been as follows: Budget 2007: €16 million; 2008: €20 million; 2009: €21 million; 2010: €23 million; 2011: €26 million; 2012: €28 million; 2013: €29 million.

⁵⁷ Final adoption of the general budget of the European Union for the financial year 2008 (2008/165/EC, Euratom), <http://eur-lex.europa.eu>. See also Statement of revenue and expenditure of the European Union Agency for Fundamental Rights for the financial year 2008, <http://fra.europa.eu>.

⁵⁸ The current amount of the FRA's subsidy for the year 2014 is € 21 million.

Each year the Director is responsible to draw up a draft that the Management Board should take as a point of reference in order to output an estimate of revenue and expenditure for the Agency for the following financial year. Then, the Management Board delivers the estimate to the Commission by the 31st of March at the latest. The Commission transmits the estimate to the European Parliament and to the EU Council with a first draft budget of the European Union (art. 272 TEC). In fact, the Commission consolidates in a first draft of the general budget of the Union, the estimates it has received from each EU institution and assesses those considered relevant for the establishment plan and the amount of the subsidy to be charged to the general budget. Finally, it is the EU Council and the Parliament, as budgetary authorities that approve the appropriation of the subsidy and adopt the Agency's establishment plan.

At this stage of the process, the Management Board shall adopt the Agency's budget that becomes final after the adoption of the general budget of the European Union. It also shall report to the Parliament and the EU Council together – as much as it shall inform the Commission - its intention to implement projects, which can be relevant for the funding of the Agency's budget (i.e. projects involving the rental or the purchase of buildings). In this case, the budgetary authority can deliver an opinion to the Management Board within six weeks from the date of notification of the project.

The director is accountable for implementing the Agency's budget. The Agency has an accounting officer who, by the 1st of March of each financial year, will report to the Commission's accounting officer the provisional accounts of the FRA along with a report on the budgetary and financial management for the year. The provisional accounts will be consolidated by the Commission's accounting Officer along with other provisional accounts supplied by the EU institutions (art. 128 of Council Regulation (EC, Euratom) No 1605/2002⁵⁹). By 31st of March following each financial year, the provisional accounts of the Agency, along with a report on the budgetary and financial management for that financial year, are transmitted by the Commission's accounting Officer to the Court of Auditors. The report must be also transmitted to the EU Council and to the Parliament. After having received the Court of Auditor's observation (art. 129 of Council Regulation (EC, Euratom) No 1605/2002), it is the Director who is in charge of drafting the final accounts under his own responsibility and sending them to the Management Board for its opinion. The Director will then deliver the final accounts along with the Management Board's opinion to the European Parliament, the Council, the Commission and the Court of Auditors by the 1st of July of each financial year. The final

⁵⁹ Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities.

accounts are then published. The Director also must reply to the Court of Auditors observations - by the 30th of September - and to the Management Board. At request of the European Parliament, the Director has to provide any information in order to facilitate the application of the discharge procedure for the financial year in question (art. 146 (3) of Council Regulation (EC, Euratom) No 1605/2002). Finally, on recommendation of the EU Council acting by a qualified majority, the EU Parliament – before the 30th of April of year N+2, gives discharge to the Director with regards to the implementation of the budget for year N. The Management Board adopts the financial rules applicable to the Agency after having consulted the Commission⁶⁰.

The financial management of the Agency is supervised by the European Anti-Fraud Office under the *Regulation (EC) No 1073/1999 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF)*⁶¹. In order to be aligned with the public financial interests of the Union, the Agency has also to accede to the Inter-institutional Agreement of 25 May 1999⁶² and has to communicate to the OLAF the provisions set up in order to implement the agreement and apply it to the entire staff. In order to guarantee the effectiveness of this financial control mechanism, each decision involving funding and the implementing agreements and instruments resulting from them, must specify that in the event it is necessary, the Court of Auditors and OLAF may investigate on the recipients of the Agency's funding and the staff responsible for allocating it⁶³.

The Agency has a legal personality enjoying the legal capacity that each of the Member State provide under their law. The Agency is represented by its Director and it legally succeeds the EUMC honouring the employment contracts concluded before the adoption of the Regulation and maintaining as its headquarters the location of the Centre (Vienna).

The Agency's staff and its Director are subjected to the rules set up in the Staff Regulations of officials of the European Communities, in the Conditions of Employment of other serv-

⁶⁰ The Management Board must consult and obtain the Commission's consent also in the event they depart from the Regulation (EC, Euratom) No 2343/2002 only if necessary for the Agency's operation (art. 21(11) Founding Regulation).

⁶¹ Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF).

⁶² Inter-institutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF).

⁶³ Interestingly, on 24 July 2014 the European Ombudsman Emily O'Reilly (pictured) has asked the European Anti-Fraud Office (OLAF) to explain to a whistle blower why it closed its investigation into alleged irregularities in a EU Agency. OLAF opened an investigation, but then closed the case and refused to tell the whistle blower the reasons. The Ombudsman has asked OLAF to reply to her recommendation by 28 February 2014. O'Reilly said: "OLAF may well have good reasons for closing its investigation, but it should explain its decision to the whistle blower. All EU institutions should encourage and support people who help them to identify and tackle problems that could weaken citizens' trust in the EU. OLAF's position in this case is discouraging for whistle blowers". See <http://www.eureporter.co>; <http://www.neurope.eu>.

ants of the European Communities and to the rules adopted jointly by the European Community institutions for the purpose of applying these staff Regulations and Conditions of Employment⁶⁴. It is indeed the Management Board, according to the European Commission, that is responsible to adopt the necessary implementing measures by referring to article 110 of the *Staff regulation of officials of the European Communities and the Conditions of Employment of other servants of the European Communities*. It can also adopt measures with the purpose to employ national experts on secondment from Member States⁶⁵ at the Agency.

Regarding language arrangements, the Agency is subjected to the provisions of the Regulation No 1 of 15 April 1958⁶⁶. In the final FRA's Regulation is also inserted a new paragraph empowering the Management Board to decide the internal language arrangements for the Agency. Furthermore, as for the other EU Bodies, the Agency uses the translation services provided by the Translation Centre for the Bodies of the European Union. The Agency is also subject to the Protocol on the privileges and Immunities of the European Communities.

The European Court of Justice has the jurisdiction in disputes concerning contractual liability of the Agency only if the contracts in question include an arbitration clause providing it. Furthermore, the Court has jurisdiction in the case of non-contractual liability of the Agency, by finding the right compensation for individuals or Member States victims of damages on behalf of FRA. Finally, the legality of the Agency's acts is subjected to the judicial review of the EU Court of Justice under article 230 TEC as well as it is possible to bring action before the Court of Justice for establishing an infringement of the Treaties by the EU institutions under art. 232 TEC.

General and Final Provisions

Among the general provisions, art. 28 of the FRA's founding regulation deals with the "Participation and scope in respect of candidate countries and countries with which a Stabilisation and Association Agreement has been concluded". It is worth noting that, in the Council regulation 2007, the role of the Agency concerning the participation of the candidate countries is softened and restricted. A first evidence of this is provided in the title of the article. In the

⁶⁴ See http://ec.europa.eu/civil_service/docs/toc100_en.pdf.

⁶⁵ According to the Commission proposal the previous EUMC had a staff of 31 persons and the Agency should have commenced its mandate in 2007 by extending this number to 52 members. It was provided that the number of the Agency's staff should have increased every year according to the following schedule and correspondingly to the financial planning until the number of 100 staff member was reached for the year 2013. Currently, the Agency has 90 members of staff and it started its mandate in 2007 with 46 members.

⁶⁶ The Regulation has been amended by Council Regulation (EC) No 920/2005 of 13 June 2005 amending Regulation No 1 of 15 April 1958 determining the language to be used by the European Economic Community, and Regulation No 1 of 15 April 1958 determining the language to be used by the European Atomic Energy Community and introducing temporary derogation measures from those Regulations.

Commission proposal 2005 the article is entitled as follows: “Participation of candidate or potential candidate countries”. In the final version the expression “participation and scope in respect of...” is inserted. Therefore, considering the wording of the title of art. 28, it can be noticed an emphasis on the scope of the Agency’s work that was not there in the proposal. A second evidence of this restrictive approach is also detected in the wording of paragraph 1. If in the Commission proposal 2005 the role of the Agency with respect to candidate countries was clearly linked to the accession negotiations, in the final version of paragraph 1 it is just stated “The Agency shall be open to the participation of candidate countries as observers”⁶⁷. Paragraph 2 specifies that the relevant Association Council has to determine whether or not a country can participate and the modalities of participation to the Agency. In accordance with the wording of the final regulation 2007, the Association Council has to define how the candidate countries will participate in the Agency’s work in Recital of articles 4 and 5 of the regulation, and of the provisions concerning the participation in initiatives commenced by the Agency, the financial contribution and the staff. Compared to the Commission proposal 2005, the final regulation no longer mentions the fact that the Association Council, among other things, should “specify the expertise and assistance to be offered to the country in question”⁶⁸. The paragraph is mainly focused on the modalities of participation of the candidate countries to the Agency rather than the contribution that the Agency may offer to them. This wording is a consequence of the final version of articles 4 and 5. As already seen, these articles no longer include a reference to article 7 TEU and to the possible field of activities of the Agency in this area. Therefore, the relationship between the Agency and the candidate countries is strongly limited to a mere participation of the latter to the Agency’s activities leaving apart the idea that the Agency may be a fundamental instrument at the service of the EU enlargement. In fact, the relevant Association Council has to indicate that the candidate country can appoint an independent person as observer to the Management Board without a right to vote⁶⁹. At the same time, the Agency is called to deal with fundamental rights in a respective country within the scope of article 3(1), in other words “within the competences of the Community as laid down in the Treaty establishing the European community”⁷⁰. This means that the Agency cannot extend its monitoring activities to areas outside the first pillar competences making it difficult a complete assessment of the human rights performance in those countries. Finally,

⁶⁷ Art. 28(1) of the Council Regulation (EC) No 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights.

⁶⁸ Art. 27(2) of the Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights COM(2005) 280 final.

⁶⁹ To this purpose, the Association Council appointing an independent person of a candidate country to the Agency’s management board shall be conformed to art 12(1)(a) of the founding regulation.

⁷⁰ FRA Founding Regulation Art. 3(1).

art. 28 provides a new paragraph according to which countries which have concluded a Stabilisation and Association Agreement with the European Community, can participate in the Agency as observers by unanimous decision of the EU Council delivered after a proposal of the European Commission.

It is clear, then, why art. 28 of the Commission proposal 2005 is omitted in the final version of the regulation. The article provides the Agency to be empowered by the Council to extend its activities to the areas covered by Title VI of the Treaty of the European Union (former Third Pillar), a broad mandate that the final regulation was not able to achieve.

The last part of the Council Regulation 2007 lays down the final provisions. At a first glance, the article devoted to specify “Transitional arrangements” is more detailed than the respective article as drafted in the Commission proposal 2005 and also presents some noteworthy differences. First of all, the end of the term of office of the members of the Management Board of the EUMC is postponed to 28 February 2007⁷¹. As a consequence, the new Management Board was not able to start its office on 1 January 2007 as it was in the intentions of the Commission Proposal 2005. The current transitional arrangements provide detailed provisions with regard to the appointment of the Management Board after the entry into force of the Council regulation. The Commission is to be the supervisor of the appointing procedure. Consequently, when the regulation becomes legally binding, the Commission has to receive, within four months, from the Member States the names of their independent persons qualified to be members of the Management Board. Once the Management Board is formed, it will start the procedure to appoint the Director of the Agency. In case the Management Board is still not formed, the Commission can appoint an interim Management Board whose members are members of the EUMC Management Board appointed by Member States, the Council of Europe and the European Commission. Finally, the Agency shall carry out its activities concerning the area of racism and xenophobia until the adoption of the MAF.

Another interesting passage of the final provisions is art. 30 of the Agency’s founding regulation. The article provides that “not later than 31 December 2011⁷², the Agency shall commission an independent external evaluation of its achievements during the first five years of operations on the basis of terms of reference issued by the Management Board in agreement with the Commission”. The evaluation has to consider not only the tasks, the practices, the financial implications and the synergy aspects of the Agency, but also the possibility to modify

⁷¹ In the Commission Proposal 2005 the end of the office of the members of the Management Board of the EUMC was 31 December 2006. The new Management Board should have started its term of office on 1 January 2007.

⁷² Also in this case the date is postponed. In the commission proposal 2005 provided that the external evaluation should have been commissioned not later than December 2009.

its scope and activities and structure taking also into account the assessments of the stakeholders at national and Community level. The external evaluation report was indeed commissioned to the Ramboll Management Consulting and presented in November 2012⁷³. After the presentation of the conclusions of the report, the Management Board is called to assess them and to deliver recommendations to the Commission that will send the evaluation report and those recommendations to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions and divulge them. After the evaluation report and of the recommendations, the Commission can propose amendments to the Regulation.

Conclusions

At the end of this analysis of the Agency's Founding Regulation, some conclusions might taken on each of its elements, such as its legal basis or its budgetary planning. However, this is not the intention. Rather, in light of the comparison that has been conducted between the Commission proposal and the current regulation, an outline of which are the most relevant changes that the Funding Regulations presents will be given.

The first relevant difference is related to the EU Charter of Fundamental Rights. As pointed out, the role of the Charter in the final regulation is softened. Since in 2007 the Charter was in a "limbo" status, it could not be an effective instrument for shaping Agency's regulation with respect to its scope and activities. Therefore, the non-legally binding status of the Charter was one of the difficulties that this regulation had to tackle.

The second difference is the absence of any reference to Title VI of the Treaty of the European Union (former Third Pillar). The FRA is one of the former First Pillar Agencies established under art. 308 TEC. As a consequence, the Agency cannot carry out its activities in police and judicial cooperation areas in criminal matters, since such matters were contained in a separate intergovernmental "Third Pillar" in the Treaty on European Union.

Finally, it has been omitted the provision for the EU Council to request the Agency's technical expertise "in the context of proceedings commenced under article 7 of the Treaty on European Union".

In summary, the most significant changes presented in the final regulation are related to the Agency's foundational and internal competences, which are strongly restricted and limited.

⁷³ Ramboll (2012), External evaluation of the European Union Agency for fundamental rights. Available at http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf.

However, it will be seen in the next chapter that this restricted mandate is now challenged by the entry into force of the Lisbon Treaty and the Charter.

CHAPTER III

Theory into Practice: an analysis of the Fundamental Rights Agency of the European Union's work

Introduction – The Fundamental Rights Agency of the European Union, the Subsidiarity principle and European Union human rights law: between the European Union competences and the scope of application of fundamental rights – The scope of the Agency's work and art. 51 of the European Charter of Fundamental Rights: an inevitable analogy – The rocking concept of “implementation”: a glance at the Court of Justice of the European Union jurisprudence prior and post the Agency establishment – 1. Pre Agency establishment – 2. Post Agency establishment: the entry into force of the Charter and the Lisbon Treaty – The Fundamental Rights Agency of the European Union's room for *manoeuvre*: the first and second Multiannual Framework – The Agency's activities from 2007 to today – 1. The Agency's activities prior to the entry into force of the Lisbon Treaty – 2. The Agency's activities post the entry into force of the Lisbon Treaty – In conclusion: what if the European Union acceded to the European Convention on Human Rights and Fundamental Freedoms?

Introduction

After having outlined the origins of the FRA's establishment and the complexity of its founding regulation, the present chapter will analyse the activities, which it has carried out from 2007 until now. The goal of this inquiry is to point out whether the FRA has been working within the limits of its scope as specified in its statute and in the MAF or whether it has been acting outside of its competences. As we have pointed out in the previous chapter, when the founding regulation deals with the scope of the FRA's action, it uses the same wording as art. 51 of the EU Charter of Fundamental Rights and Freedoms. This resemblance means on the one hand that the Charter had a certain impact on the drafting of the FRA's statute even though at that time it was not legally binding, and, on the other hand, that the Agency's scope was shaped according to the same spirit of subsidiarity of art. 51 of the Charter. Yet, according to the explanations relating to the EU Charter of Fundamental Rights the meaning of art. 51 must be interpreted in accordance with ECJ jurisprudence. However, as we will see, the ECJ's case law as highlighted by the Charter's official explanations, and also by the jurisprudence developed after the entry into force of the Lisbon Treaty and the Charter, shows that the contours of the field of application of EU

fundamental rights are quite rocking. Therefore, even though there is no direct impact of the ECJ case law on the Agency's scope, our inquiry will take account of the Agency's activities in light of the clear similarity between art. 51 of the Charter and art. 3 of the FRA's statute. After having observed the Agency's scope in practice, it will be argued that its limits are subject to the same rocking that characterized the field of application of art. 51 of the Charter.

The Fundamental Rights Agency of the European Union, the subsidiarity principle, and European Union human rights law: between European Union competences and the scope of application of fundamental rights

Before analysing its activities, the relationship between the FRA and the principle of subsidiarity will be briefly sketched. This principle can be considered in a wide sense as “a preference for governance at the most local level consistent with achieving government's stated purposes”¹ and also in a more narrow sense as laid down according to the EU constitutional framework. We can thereby look at the FRA through both these lenses.

As regards its narrow sense, the EC Treaty² has defined the principle of subsidiarity in its art. 5(2) (now 5(3) TEU):

“In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community”³.

According to this provision the principle of subsidiarity plays a significant role within the distribution of powers between the Member States and the European Community. Indeed, where the Community does not exercise its exclusive competences, this principle should provide a dynamic structure to the exercise of powers by the Community in relation to the Member States. However, despite this strict distribution of competences, the Community is equipped with another instrument, the Flexibility Clause as per art. 308 TEC (now art. 352 TFEU), which enables the Community to take action beyond the limit of its competence if the objective pursued so requires. This provision thereby offers to the Community consid-

¹ G.A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, (1994) 94/2 C.L. Review, 332.

² The formulation of art 5(1), 5(2) TEU essentially resemble the wording of art 5(2)

³ Art. 5.2 EC (now Art. 5(3) TEU).

erable room for manoeuvre⁴ so as to “creatively” interpret and its powers in a number of fields. So, for example, the Community has allocated to itself powers in relation to the conclusion of international agreements, the granting of emergency food aid to third countries, and the creation of new institutions – something that has been criticized as a power grab⁵.

In the previous chapter it has been showed that like most other EU agencies which were set up at that time of its establishment, the FRA was created on the basis of art. 308 TEC (now Article 352 TFEU) according to the following requirements:

“If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”⁶

Notwithstanding this, the EJC in its Opinion 2/94 has clarified that whereas art. 308 has a broad scope it

“cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose”⁷.

The framework of art. 308 TEC clearly limits the field of action of such agencies to the EC competences. This means that they are not generally allowed to carry out their activities beyond the limits of the first pillar. However, with regards to the FRA, as the Committee on

⁴ A complete analysis of article 308 TEC and its implications are provided in European Scrutiny Committee, *Article 308 of the EC Treaty* (HC 2008-2009). Available at <http://www.publications.parliament.uk>.

⁵ “In a variety of fields, including, for example, conclusion of international agreements, the granting of emergency food aid to third countries, and creation of new institutions, the Community made use of Article 235 in a manner that was simply not consistent with the narrow interpretation of the Article as a codification of implied powers doctrine in its instrumental sense. Only a truly radical and “creative” reading of the Article could explain and justify its usage as, for example, the legal basis for granting emergency food aid to non-associated states. But this wide reading, in which all political institutions partook, meant that it would become virtually impossible to find an activity which could not be brought within the “objectives of the Treaty.” This constituted the climax of the process of mutation and is the basis for my claim not merely that no core activity of state function could be seen any longer as still constitutionally immune from Community action (which really goes to the issue of absorption), but also that no sphere of the material competence could be excluded from the Community acting under Article 235”. See J.H.H. Weiler, *The Transformation of Europe*, (1991) 100 Y.L.J., 2403.

⁶ Art. 308 TEC (now Article 352 TFEU).

⁷ Opinion 2/94, 28 March 1996.

Legal Affairs and Human Rights of the Council of Europe clearly pointed out,⁸ , it was not so clear to what extent fundamental rights were parts of the EC objectives⁹.

In connection with the issues concerning article 308, we also have seen that in its 2005 proposal for the Agency's founding regulation, the Commission found that the FRA complied with the principles of subsidiarity and proportionality. But we have already seen that those reasons were not found fully satisfactory. Indeed, D. Geradin, N. Petit argues, "in a system characterized by subsidiarity in the field of non-exclusive competences, the creation of an European Agency must be justified by the fact that (i) the matter in question cannot be satisfactorily addressed at the national level and (ii) the goals can be better achieved by action at the EC level (i.e. through the creation of a European Agency)"¹⁰.

For this set of reasons, the creation of a new Agency has been seen by the Member States as increasing the Community's central bureaucracy at the expense of subsidiarity:

"The creation of EC agencies (this is particularly true in the field of network industries) has been seen by many as a movement towards deeper centralization, as well as a risk of increasing bureaucracy. Member States have therefore often opposed the creation of European regulatory agencies"¹¹.

Through the lens of a wide understanding of the principle of subsidiarity, we can identify an initial connection between this principle and the fundamental rights realm in the context of the EU in the EU Charter of Fundamental Rights. The principle of subsidiarity is not simply mentioned in the Charter's Preamble but it is instanced and articulated in its art. 51. It provides that the fundamental rights included in the Charter "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law"¹². Interestingly the ECJ "has never annulled any act on the basis of disregarding the principle of subsidiarity, nor has it established any test that would specify steps to be taken by the ECJ when examining observance of the principle in question"¹³.

⁸ PACE Doc. 10894 on 11 April 2006.

⁹ See J.H.H. Weiler, *The Transformation of Europe*, *supra* note 5.

¹⁰ D. Geradin, N. Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform*, Jean Monnet Working Paper 01/04.

¹¹ *ibid.*

¹² Art. 51(1) EU Charter of Fundamental Rights.

¹³ J. Jirásek, *Application of the Principle of Subsidiarity on Decision Making of the ECJ in the Area of Fundamental Rights Protection*, Dny práva – 2009 – Days of Law: the Conference Proceedings, 1, Brno: Masaryk University, 2009.

However some scholars¹⁴ argue that when analysing the ECJ's case law concerning fundamental rights certain aspects of this subsidiarity principle come into light. Indeed it is not a coincidence that the Court relies on the constitutional traditions of the Member States when determining the content of fundamental rights. Yet the Court's judicial review seems to be severer when it reviews acts of the EU institutions than when it reviews acts of Member States implementing the European law or derogating from the treaties' obligations¹⁵. Carozza explains the ECJ's attitude as follows: "There are two ways that subsidiarity could be regarded as tacitly present in the case law of the European Court of Justice. One has to do with the sources of law that ECJ uses in reaching decisions on the content of EU fundamental rights, and the other involves the scope of that law's application to the action of the member states"¹⁶.

According to this wide understanding of subsidiarity, we can view the Agency's activities as inspired by the principle of subsidiarity even though they have neither legal nor political effect. Furthermore, it is important to consider the resemblance between the formulations of art. 51(1) of the Charter and art. 3(3) of the FRA's Founding Regulation: such coherence seems to highlight the particular view that the Agency should adopt when carrying out its activities in relation to Member States. Indeed, as we will see, art. 3(3) retraces in an even stricter way the Charter's attitude toward Member States as enshrined in art 51(1). In other words, while the Agency cannot form legally binding acts, it is nonetheless the case that "the monitoring of the situation of fundamental rights in the Member States is indispensable for an informed exercise by the Union of its competences in the field of fundamental rights, in conformity with the principle of subsidiarity"¹⁷.

The scope of the Agency's work and art. 51 of the European Charter of Fundamental Rights: an inevitable analogy

The scope of application of the EU Charter of Fundamental Rights is determined by art. 51. This provides that the fundamental rights included in the Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and

¹⁴ P. Carozza, *Subsidiarity as a structural principle of international human rights law*, (2003) 97/38, A.J.I.L., 38.

¹⁵ D. Geradin, N. Petit, *supra* note 10.

¹⁶ P. Carozza, *supra* note 14.

¹⁷ O. De Schutter, V. Van Goethem, *The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (I): The added value of a systematic and regular monitoring of the situation of fundamental rights in the Member States for the evaluation of the implementation of Union laws and policies*, Working paper series : REFGOV-FR-5, 2006.

also to the Member States only when they are implementing Union law. Some authors¹⁸ argued that unlike the US federal bill of rights, which has an extensive field of application¹⁹ irrespective of the subject matter at issues, art. 51 and its spirit of subsidiarity preclude a federal evolution of the Charter. Indeed, the ECJ lacks the power to review the compatibility of the national rules, which are outside the scope of the Union Law, with the EU Fundamental Rights. Therefore, via the wording of art. 51 the Charter is integrated in a supranational system entailing a multilevel system of protection of fundamental rights. The rights included in the Charter result from

“the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights”²⁰.

The idea to create a monitoring Agency in the field of fundamental rights and the idea to draft a Charter of fundamental rights of the European Union arose approximately in the same period. Indeed, the Charter influences in several ways the Agency’s activities and scope. In addition, it is worthy to note that when the Agency was effectively established in 2007, the Charter was not yet legally binding and it had a merely declarative value. Notwithstanding its non-legally binding status, in the same year of the Agency’s establishment the Charter was proclaimed for the second time and the Lisbon Treaty was signed. Therefore, despite the fact that the Charter could not play a role as legal source for the Agency’s

¹⁸ X. Groussot, L. Pech, G. T. Petursson, *The Scope of Application of Fundamental Rights on Member States’ Action: In Search of Certainty in EU Adjudication*, Eric Stein Working Paper No 1/2011. Available at <http://ssrn.com/abstract=1936473>. See also K. Lanaert, *Respect for Fundamental Rights as a Constitutional Principle of the European Union* (2000) 6/1 C.J.E.L., 21. Lord Goldsmith, *The Charter of Rights – a brake not an accelerator*, (2004) 5 E.H.R.L.R., 473.

¹⁹ The evolution of the scope of application of the US bill of rights is synthetically explained by Grussot, Pech, Petursson as follows: “...in the first half of the 20th century, the US Supreme Court decided, on its own initiative, to incorporate the federal Bill of Rights through an expansive interpretation of the Fourteenth Amendment to the US Constitution. ... in 1925 case of *Gitlow v. New York*, the US Supreme Court finally decided that through the Fourteen Amendment, a plaintiff is entitled to rely on the right to free speech protected by the first Amendment to challenge the constitutionality of a state law which made it a crime to advocate the violent overthrow of government. This came as a relative surprise as the Supreme Court initially held the Bill of Rights to apply only to the Federal Government, which mean that the Federal courts could not prevent enforcement of state laws restricting the rights guaranteed in the bill of Rights. ... since *Gitlow*, the Supreme Court has allowed, on the basis of the fourteen Amendment, for the progressive expansion of the Federal bill of Rights’ scope of application to all states norms even when the states act within their own sphere of competence. Thanks to this arguably radical reinterpretation of the federal constitutional text, the US Supreme Court has built a unified constitutional order as regards respect for fundamental rights”. *ibid.* See also S. de Vries, U. Bernitz, S. Weatheri (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013).

²⁰ EU Charter of Fundamental Rights and Freedoms, *Preamble*.

mandate in the field of Fundamental Rights, its influence has been far from marginal. In particular, it is precisely with regard to the FRA's objectives and scope that there is a relevant analogy with the Charter. Art. 2 of the FRA's founding regulation states:

“The objective of the Agency shall be to provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights”²¹.

Yet, art. 3(3) of the Regulation provides that:

“The Agency shall deal with fundamental-rights issues in the European Union and in its Member States when implementing Community law”²².

The formulations, which are used in the FRA's founding regulation to determine the Agency's objectives and scope, resemble the art. 51 formulation:

“The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law”²³.

To put it differently, the Agency has neither a legally binding power nor a decision-making power; given its data gathering and informative function with regard to EU fundamental rights, it is called to carry out its tasks in light of the same spirit of art. 51 of the Charter.

However, as we will see, the interpretation of art. 51(1) and in particular, the meaning of the expression “only when they are implementing Union Law”, is not as clear. The explanations relating to the EU Charter of Fundamental Rights are one example of this lack of a straightforward interpretation of this provision. In the beginning of the paragraph devoted to the explanation of art. 51, it is stated that “as regards the Member States, the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they act in the scope of Union law*”. This part of the paragraph refers to a range of case law of the ECJ, which also include law cases of Member States's derogation from EU law, under the scope of Union. However, the second part of the explanations of

²¹ Council Regulation (EC) 168/2007 of 15 February 2007 establishing a European Union Agency for Fundamental Rights [2007] OJ L 53/14.

²² *ibid.*

²³ EU Charter of Fundamental Rights, art. 51(1).

the paragraph concludes by quoting the Karlsson's case, that follows a narrower interpretation of the scope of the Charter's provisions: "it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules"^{24 25}.

In light of the foregoing it is important to consider whether the expression "when they are implementing Union Law" any implications on the formulation of art. 2 and art. 3(3) of the FRA's founding regulations? Compared to art. 51 of the Charter, the scope of the Agency's activities is narrower for two reasons. First, the Charter has its function within the scope of EU law, while the Agency has to carry out its activities within the scope of EC law. In other words the Agency cannot deal with matters concerning the third pillar. Secondly, as Jacqueline Dutheil de la Rochere has commented upon, the focus of art 3(3) of the FRA Founding Regulation on the notion of *implementation* rather than on "the broader formulation *within the scope of application of Community law* seems deliberate it authorizes the exclusion of cases where Member States derogate from Union law"²⁶. Therefore, it seems that in the case of the Agency, the formulation of art. 3(3) of the founding regulation not only resembles the wording of art. 51 of the Charter but narrows it by using the concept of implementation.

Yet, as Dutheil de la Rochere again notes, more recent case law of the Court of Justice has expanded the concept of "implementation". In the next paragraph the relevant case law of the Court of Justice will be examined in order to highlight this jurisprudential evolution. This overview will be helpful to our inquiry into the Agency's activities, bearing in mind that the FRA does not deal with the compatibility of national measures implementing EU law with EU Fundamental Rights²⁷ - it instead offers comparative and reliable data and information on the implementation of fundamental rights standards by the relevant EU institutions and EU Member States²⁸.

²⁴ Case C-292/97 Karlsson [2000] ECR I-2737.

²⁵ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

²⁶ J. Dutheil de la Rochere, *Challenges for the Protection of Fundamental Rights in the EU at the Time of the Entry into Force of the Lisbon Treaty*, Fordham Int'l L. J. (2011) 33/6, 1776.

²⁷ See art. 4(2) FRA Founding Regulation: "The conclusions, opinions and reports... shall not deal with the legality of acts within the meaning of Article 230 of the Treaty or with the question of whether a Member State has failed to fulfill an obligation under the Treaty within the meaning of Article 226 of the Treaty".

²⁸ See FRA Founding Regulation, Fourth Recital, *Preamble*.

The rocking concept of “implementation”: a glance at the Court of Justice of the European Union jurisprudence prior and post the Agency establishment

The EU Court of Justice has devoted attention to the interpretation of the concept of implementation in several decisions. However, its case law does not result in a simple, linear analysis but in an interpretation swinging over and back between a strict and a functional hermeneutic.²⁹ In other words, when the ECJ’s adjudication of fundamental rights involves the scope of its judicial review of Member States’ acts allegedly violating Community fundamental rights, “the case law of the Court shows in practice a sort of sliding scale of review for compliance with norms of Community fundamental rights”³⁰ which some commentators see as “consistent with the requirements of subsidiarity”³¹.

The ECJ had started to shape the contours of the concept of implementation even before the entry into force of the Charter. Since the very beginning the Court has resorted to the concept of scope of Union law with the purpose to make clearer when national authorities are bound by EU fundamental rights standards. A series of decisions settled that Member States are bound by EU fundamental Rights standards when acting as agents of EU law or when derogating from EU law on public policy or other grounds as provided for by EU law itself³². In the following sections we will offer a short overview of the case law of the ECJ. To this end we do not analyse the case law using the classical distinction between pre-Lisbon decisions and post-Lisbon decisions, but, given that the scope of our present inquiry it is to reflect on the analogy between the concept of implementation as interpreted by the ECJ and as applied by the FRA according to its Founding Regulation, we will consider the ECJ judgments before and after the Agency’s establishment.

1. Pre Agency establishment

Before the Agency’s establishment, the ECJ delivered a number of crucial judgments that attempted to clarify the contours of the scope of fundamental rights protection within the European Community. After having affirmed that fundamental rights were “enshrined in the general principles of Community law and protected by the Court”,³³ the Court started

²⁹ See P. Yowell, *The Justiciability of the Charter of Fundamental Rights in the Domestic Law of Member States* in P.M. Huber and K. Ziegler (eds), *The EU and National Constitutional Law* (Richard Boorberg Verlag, 2012), 107, 123. P. Craig, *The Lisbon Treaty Law, Politics, and Treaty Reform* (OUP 2011), 206, 214.

³⁰ P. Carozza, *supra* note 14.

³¹ *ibid.*

³² X. Groussot, L. Pech, G. T. Petursson, *supra* note 18.

³³ Case C-29/69 Stauder [1969] ECR 419.

to habitually review acts of the Community's institutions in light of fundamental rights. It is within the dialectical relationship between supranational and national protection of fundamental rights, that demarking the extension of its judicial review has revealed certain challenges. In other words, the Court found it difficult to “clarify when national authorities are bound by EU fundamental rights standards and had recourse to the concept of scope (or field) of Union law”³⁴. The Court did not develop a unidirectional interpretation of these situations but its case law swings between different tendencies: one in favour of a narrow interpretation of the scope of application of the EC fundamental rights standards connected with the expression “when implementing EU law” (the leading case being *Wachauf*³⁵), and the other one referring to the formulation “within the scope of EU law” that is more open to a functional interpretation of it (the leading case being *ERT*³⁶). Here we do not intend to extensively analyse the ECJ's case law concerning fundamental rights implementation by the national authorities but only to offer a sketch so as to show the fluid nature of the concept of “implementation” itself.

In 1989 the ECJ (third section) through the *Wachauf* decision ruled that its review powers extended to the acts of Member States to the extent that they fall within areas of Community law. The case concerned national legislation implementing several EU regulations as regards the organization of the milk market, and which was considered to violate the plaintiff's rights under the German Constitution. The ECJ was called to tackle several issues, in particular whether Member States shall respect fundamental rights as general principles of EU law when they are implementing Community rules. The Advocate General Jacobs addressed this question by stating that “... it appears to me self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator”.³⁷ The Court followed the position of the Advocate General Jacobs and stated that the requirements of the protection of fundamental rights in the Community legal order “are also binding on the Member States *when they are implementing Community rules*, the Member States must, as far as possible, apply those rules in accordance with those requirements”³⁸. Throughout its arguments the Court took the opportunity to clarify that Member States must conform to general principles of human rights when implementing Community law (in this specific case when they are implementing reg-

³⁴ X. Groussot, L. Pech, G. T. Petursson, *supra* note 18.

³⁵ Case C-5/88 *Wachauf* [1989] ECR 2609.

³⁶ Case C-260/89 *ERT* [1991] ECR I-2925.

³⁷ Case C-5/88 *Wachauf* [1989] ECR 2609, Opinion of AG Jacobs.

³⁸ Case C-5/88 *Wachauf* [1989] ECR 2609, par. 19.

ulations) thus restricting the scope of application of EC fundamental rights to a narrow concept of implementation.

Two years after the Wachauf case, in 1991 the ECJ was called to decide a case concerning the legality of a grant of a monopoly by Greece to a public radio and television company, Elliniki Radiofonia Tileorasi (ERT). On this occasion the Court extended its power of review of the state measures not only in such cases where the national authorities are implementing Community law, but also where they are derogating from its provision or justifying a restriction on community rules in the interest of some conflicting national policy. According to the Court such national action, which Member States perform on the basis of one of the express derogation clauses contained in the EC Treaty or for reasons of public interest, must be compatible with EU fundamental rights. In other words, where national rules

“fall *within the scope of Community law*, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights”³⁹.

Therefore, as a Member state

“relies on the combined provisions of Articles 56 and 66 TEC in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court”⁴⁰.

The ERT case significantly expanded the scope of EU law to include national derogations from EU law among those acts under possible review of the ECJ and thus it allowed “for the direct effect of fundamental rights in all those situations, which have an ever unclear link with the EU law”⁴¹. From this moment onward, Wachauf and ERT would become two points of reference influencing the ECJ’s decisions. They became two polarities between which the ECJ’s case law moves in a pendulum-like fashion.

³⁹ Case C-260/89 ERT [1991] ECR I-2925, par. 42

⁴⁰ *ibid*, par. 43.

⁴¹ X. Groussot, L. Pech, G. T. Petursson, *supra* note 18.

In 1994, through the Bostock⁴² case, the Court again adopted a narrow approach in another case involving milk quota. With reference to Wachauf, the Court reaffirmed that “Member states shall respect fundamental rights when they are implementing EU law, in other words they must, as far as possible, apply those rules in accordance with those requirements”⁴³. Similarly, the ERT approach was confirmed in 1997 with the Familiapress⁴⁴ case. There the Court held that EU Member States may invoke the need to protect fundamental rights as general principles of law not only when they are implementing EC law but also when they derogate from EC law by relying upon a range of public interest justifications or mandatory requirements developed through the case law of the Court. In 2002, with the Caballero⁴⁵ case, the Court restated that fundamental rights form an integral part of “the general principles of law whose observance the Court ensures and that the requirements flowing from the protection of fundamental rights in the EU legal order are also binding on Member States when they implement EU rules”⁴⁶. However, in the same year a spouse of a British citizen – a Mrs Carpenter – who was a national of the Philippines and applied for a permit to stay in the UK was unable to benefit from a right to reside in the UK based on Directive 73/148, and a deportation order was issued. The Court, recalling the ERT and Familiapress cases, stated: “A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures”⁴⁷.

These cases are only a sketch of the ECJ’s decisions prior to the entry into force of the Lisbon Treaty and the establishment of the Agency. However this short and cursory overview suffices to show clearly that the ECJ uses both a narrow interpretation of the concept of implementation and a broader and evaluative interpretation characterizing the line of cases that flow from ERT. According to Grissout, Pech and Petursson, “this state of affairs reflects the casuistic nature of the scope of EU law and has arguably contributed to the lack of certainty surrounding this concept”⁴⁸. It will be questioned whether the entry into force of the Lisbon Treaty and of the EU Charter of Fundamental Rights will change the scenario. Will the pendulum of the ECJ’s review mechanism stop swinging?

⁴² Case C-2/92 Bostock [1994] ECR I-0000.

⁴³ *ibid.*

⁴⁴ Case C-368/95 Familiapress [1997] ECR I-3689.

⁴⁵ Case C-442/00 Caballero [2002] ECR I-11915.

⁴⁶ *ibid.*

⁴⁷ Case C-60/00 Carpenter [2002] ECR I-6279.

⁴⁸ X. Groussot, L. Pech, G. T. Petursson, *supra* note 18.

2. Post Agency establishment: the entry into force of the Charter and the Lisbon Treaty

With the entry into force of the Lisbon Treaty, the EU Charter of Fundamental Rights became legally binding. The Charter has the same legal value of a Treaty and it has enshrined within it human rights provisions. These are contained in international human rights treaties, in the case law of the ECJ, and in fundamental rights and principles pertaining to the Constitutional traditions of the EU Member States. However, the Charter does not empower the ECJ to review the compatibility of EU and Member States legislation with fundamental rights. The Charter was equipped with art. 51 provision preventing the Court from reviewing Member States' acts which fall outside the scope of the Union law and was drafted with the purpose to codify the pre-Lisbon case law which has been cursorily sketched above. Art. 51 appears even more narrow than the pre-Lisbon case law of the ECJ as it clearly states that Member States must respect the fundamental rights enshrined in the Charter *only when they are implementing Union Law* (excluding situations where the national authorities derogate from EU law, i.e. ERT style cases). However, if we look at the Charter's official explanations, it should be noticed that as regards art. 51 they offer a combination of formulas used in the alternating jurisprudence of the ECJ. So, while in the first part of the Charter's official explanations a broad formulation is employed through references to both the Wachauf and ERT cases ("the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law"), in the second part it is restated that "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules."⁴⁹ Furthermore, as De Burca⁵⁰ explains, during the drafting of the Charter, it was decided to adopt the formulation "only when they are implementing EU law", in favour of a narrow interpretation of the scope of the application of the charter. In light of these points, we will choose another group of ECJ cases which follow the entry into force of the Lisbon Treaty in order to determine if the concept of "implementation" is still subject to the same alternating interpretations as when the Charter was not legally binding.

The first significant ECJ decision to be considered in this context is the DEB case⁵¹ (2010) wherein a German national regulations, which prevented a legal person from avail-

⁴⁹ Case C-2/92 Bostock [1994] ECR I-0000.

⁵⁰ G. De Búrca, The drafting of the European Charter of fundamental rights, (2001) 26 E.L.R. 136,137.

⁵¹ Case C-279/09 DEB [2010] ECR I-13849.

ing themselves of legal aid, were considered incompatible with the principle of effective judicial protection as enshrined in the Charter (art. 47). In this case the German procedural regulations were not adopted with the purpose of implementing European acts. However, the Court, by extending the interpretation of the principle of effectiveness, took the opportunity to broaden the field of application of fundamental rights guarantees by going beyond the Wachauf style approach. As Safjan explains:

“The connection between European law and the national regulation is explained here not in the category of formal execution of a European act by the national lawmaker, but by the assessment of effects which may result from the application of certain regulations, falling within the sphere of autonomic competences of the national lawmaker which operate beyond the prerogatives of the European lawmaker”⁵².

With the McCarthy⁵³ and Dereci⁵⁴ cases (2011) the Court decided to adopt a more formal approach in favour of the Member State’s margin of discretion. The Dereci case involved applicants having their applications for residency permits rejected by the Austrian Bundesministerium für Inneres, which refused to apply provisions under Directive 2004/38/EC for family members of EU citizens on the grounds that the Union citizen concerned had not exercised a right to freedom of movement. On this occasion the Court took the opportunity to remark as follows:

“However, it must be borne in mind that the provisions of the Charter are, according to Article 51(1) thereof, addressed to the Member States only when they are implementing European Union law. Under Article 51(2), the Charter does not extend the field of application of European Union law beyond the powers of the Union, and it does not establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, the law of the European Union within the limits of the powers conferred on it”⁵⁵.

In N.S. and Others⁵⁶ the Court once again used a functional interpretation of art. 51(1). The decision concerns the operation of Council Regulation (EC) No 343/2003, better known as the “Dublin II” Regulation, in a case where an Afghan national claimed asylum to UK. The Court recognized that “the discretionary power conferred on the Member States by Art. 3(2) of the Regulation No 343/2003 forms part of the mechanisms for de-

⁵² M. Safjan, Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?, EUI Working Paper LAW 2012/22.

⁵³ Case C-434/09 McCarthy [2011] ECR I-3375.

⁵⁴ Case C-256/11 Dereci [2011] ECR I-11315.

⁵⁵ *ibid.*

⁵⁶ Joined cases C-411/10 and C-493/10 N. S. and Others [2011] ECR I-0000.

termining the Member State responsible for an asylum application provided for under that regulation and, therefore, is merely an element of the Common European Asylum System”⁵⁷. Therefore, when a Member State exercises that discretionary power, it must be considered as “implementing European Union Law within the meaning of art 51(1) of the Charter”⁵⁸.

One of the most relevant decisions of the Court is without doubt the recent judgment *Åkerberg Fransson*⁵⁹ concerning the interpretation of the right not to be convicted twice for the same action as protected by Article 50 of the Charter. Mr Fransson was a fisherman who had infringed Swedish tax law by submitting a false tax assessment. The Skatterverket imposed a fine, part of which related to the VAT losses incurred by the State. Subsequently, criminal proceedings were also initiated against Mr Åkerberg Fransson by the Haparanda tingsrätt on the grounds of serious tax offences. The Court considered the case to fall within the scope of the Charter even though, as the Advocate General submitted,⁶⁰ there is a weak connection between the domestic law governing the taxation system and EU law. Constructing a link between three sources of EU law (VAT Council Directives 77/388 and 2006/11, art 4(3) TEU and art 325 TFEU), the Court concluded that both the tax surcharges imposed on Mr Fransson and the criminal proceedings brought against him constituted an implementation of EU law for the purposes of art 51(1) of the Charter.

According to Hancox this decision “demonstrates a desire to move beyond the language of *implementing* in the provision, looking beyond this to the description of scope in the Explanations and in the pre-Charter case law. Notably, the ECJ introduces different terminology, for example, when a situation is *governed* by EU law, or where EU law is *applicable*”⁶¹. The *Fransson* approach thus finally moves beyond the previous dualism between the idea of “falling within the scope of Union law” (contained within the cases involving derogation from EU law) and the strict interpretation of the notion of “implementing”. Through this decision the expression “when implementing Union Law” no longer belongs to the realm of the narrow interpretation of art 51(1); rather the notion of implementation included in art. 51(1) has a broader meaning such that it involves “all situations governed by EU law”⁶².

⁵⁷ *ibid.*

⁵⁸ *ibid.*

⁵⁹ Case C-617/10 *Åkerberg Fransson* [2013] ECR I- 0000.

⁶⁰ Case C-617/10 *Åkerberg Fransson* [2013] ECR I- 0000, Opinion of AG Villalon.

⁶¹ Emily Hancox, *The meaning of “implementing” EU law under Article 51(1) of the Charter: Åkerberg Fransson*, (2013) 50 C.M.L.R., 1411.

⁶² See B. van Bockel, P. Wattel, *New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson*, (2013) 6 E.L.R., 1411.

With the Fransson case, the ECJ seems to take a new direction. So while the above-cited cases indicate the same indeterminate and alternating attitude of the Court we identified as existing prior to the Treaty of Lisbon, now we see a gradual merging of the notion of “implementation” with the notion “within the scope of EU law” which climaxes in Fransson. In his Opinion the Advocate General believes

“that it would be helpful to view the different formulations used as expressions which are not qualitatively different. It is clear that nuances may be identified between them. However, the boundaries are always blurred. In particular, as I understand it, the two formulations concerned point to a situation where, since there is always a discretion on the part of the Member States, meaning that any infringement of a right cannot correctly be attributed to the Union, the presence of Union law in the scenario concerned is sufficiently strong to warrant an assessment of the scenario in the light of Union law, and therefore by the Court of Justice”⁶³.

Therefore, through its judgment it appears that the Court intends to attribute to the Charter a wider scope of application.

In light of this scenario the Agency certainly must deal with a concept of implementation, which is rather nuanced and under-determined. However, must recall that its activities and its research are conducted within a limited remit as drawn by its Founding Regulation, and in particular by its MAF. Therefore, before taking into account the FRA’s activities it is necessary to focus briefly on its MAF.

The Fundamental Rights Agency of the European Union’s room for *manoeuvre*: the first and second Multiannual Framework

As it has been anticipated in the previous chapters, the scope of the Agency’s activities is determined not only according art. 3 of its Founding Regulation but also through another legal instrument: the MAF. The MAF defines the thematic areas, which are subject to the FRA’s analysis. Until recently the FRA had two MAFs. The first MAF was adopted by the EU Council on the 28th February 2008⁶⁴ and established that the Agency should work on nine thematic areas:

1. racism, xenophobia and related intolerance;

⁶³ Case C-61710 Åkerberg Fransson [2013] ECR I- 0000, Opinion of AG Villalon.

⁶⁴ Council Regulation (EC) 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012. Available at <http://fra.europa.eu>.

2. discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds (multiple discrimination);
3. compensation of victims;
4. the rights of the child, including the protection of children;
5. asylum, immigration and integration of migrants;
6. visa and border control;
7. participation of the EU citizens in the Union's democratic functioning;
8. information society and, in particular, respect for private life and protection of personal data;
9. access to efficient and independent justice.

However, the Agency in accordance with Article 5(3)⁶⁵ of its founding regulation can work outside these thematic areas upon a request of the European Parliament, the Council or the Commission.

In 2013, this time in the context of a new EU constitutional framework as the Lisbon Treaty was already entered into force, a second MAF⁶⁶ was adopted. The main thematic areas covered by the Agency's activities were reconfirmed with some alterations: three new thematic areas including the previews "compensation to victims", "roma integration" and "judicial cooperation except criminal matters" were introduced, while "asylum, immigration and integration of migrants" and "visa and border control" were merged in one thematic area. Finally, the area concerning participation of the EU citizens in the Union's democratic functioning disappeared from the purview of the FRA. The Management Board of the Agency delivered an opinion on the proposal for the MAF 2013-2017 for the Agency⁶⁷. According to Art. 5 (1) of the Founding Regulation, the Commission shall consult the Management Board of the EU Agency for Fundamental Rights when proposing a new Multi-annual Framework for the FRA. The opinion also includes the results of the consultation that was open to the Fundamental Rights Platform from 20 July 2011 to 16 September 2011 as requested by the European Commission.

⁶⁵ "The Agency shall carry out its tasks within the thematic areas determined by the Multiannual Framework. This shall be without prejudice to the responses of the Agency to requests from the European Parliament, the Council or the Commission under Article 4(1)(c) and (d) outside these thematic areas, provided its financial and human resources so permit". Art. 5(3) FRA Founding Regulation.

⁶⁶ Council Decision 252/2013/EU establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights. Available at <http://fra.europa.eu>.

⁶⁷ Opinion of the Management Board of the EU Agency for Fundamental Rights on the European Commission's proposal for a new Multi-annual Framework (2013-2017) for the Agency. Available at <http://fra.europa.eu>.

It has to be considered that, on the 2nd December 2010, the European Commission had already submitted a proposal for amending the first MAF. In light of the changes generated by the Treaty of Lisbon, the Commission asked for an extension of the MAF's thematic areas to the areas covered by the former third pillar (cooperation in criminal matters and police cooperation). With this aim in mind, the Commission did not consider it necessary to amend the Agency's founding regulation since art. 325 TFEU (former art. 308 TEC) now "applies to all matters falling under the scope of this Treaty"⁶⁸. Instead it was considered necessary to amend the MAF "in order to enable the Agency to carry out its tasks in these areas"⁶⁹. Furthermore, the Commission supported its proposal by referring to the results of the public consultation of 2005 involving the proposal for the Agency's founding regulation. It was remarked how at that time "consulted stakeholders had expressed a strong wish for the areas of judicial cooperation in criminal matters and police cooperation to be included in the scope of the Agency's activities"⁷⁰.

Therefore, with regards to the MB's opinion on the MAF 2013 - 2017, the FRA's MB, in line with the Commission's proposal and given the developments generated by the Lisbon Treaty, proposed to add judicial and police cooperation to the other thematic areas covering, in this way, the former third pillar area. In particular, in the explanatory memorandum accompanying the Opinion of the Management Board of the EU Agency for Fundamental Rights on a new Multi-Annual Framework (2013–2017) for the agency, the FRA's Management Board considers:

"the coming into force of the Treaty of Lisbon; the Charter of Fundamental Rights of the European Union becoming legally binding and having an equal status to that of the treaties (primary law); the relevant sections of the Stockholm Programme; the implementation measures taken by the Commission, the Council, and the Parliament in relation to the Charter of Fundamental Rights; the implications for the work of the FRA with the accession of the EU to the UN Convention on the Rights of Persons with Disabilities, notably in relation to Article 33 (2); and non-discrimination and equality between men and women including gender equality as a horizontal requirement; the need to enhance the cooperation with the Council of Europe, in particular in the perspective of the accession of the EU to the ECHR"⁷¹.

⁶⁸ Proposal Council Decision amending Decision (2008/203/EC) of 28 February 2008 implementing Regulation (EC) No 168/2007 as regards the adoption of a Multi-annual Framework for the European Union Agency for Fundamental Rights for 2007-2012, COM(2010) 708 final.

⁶⁹ *ibid.*

⁷⁰ *ibid.*

⁷¹ See the Explanatory Memorandum annexed to the Opinion of the Management Board of the EU Agency for Fundamental Rights on the European Commission's proposal for a new multi-annual framework (2013– 2017) for the agency. Available at <http://fra.europa.eu>.

The Management Board proposed the introduction of a new area in the Framework 2013–2017 related to Article 33 (2) of the UN Convention on the Rights of Persons with Disabilities, in light of the expected role of the Agency in a future “framework [...] to promote, protect and monitor implementation” of the Convention. Furthermore, the Management Board also defended the importance of maintaining the thematic area of “participation of the citizens of the Union in the Union’s democratic functioning” by citing the relevance of the right of political participation as enshrined in the Charter. It also proposed to include in the MAF a new area devoted to social rights⁷² “which would also include social security, with a special focus on poverty reduction and social exclusion and the protection of employees and consumers... This would ensure a balance of coverage of the rights listed in the Charter, which take up almost a quarter of this instrument and are of particular relevance to everyone”⁷³.

Unfortunately the MAF 2013–2017 adopted by the EU Council did not include the amendments proposed by the FRA’s Management Board and the EU Commission. The MAF thereby limits the FRA activities to areas covered by the former first pillar. Hence FRA can gather data and information and carry out projects on fundamental rights protection in relation to policies and legislation of the relevant EU institutions and the Member States when implementing EU law but only within a limited remit. However, as we will see, it is with regards to its cooperation with relevant EU institutions that the Agency can go beyond its limited scope.

The Agency’s activities from 2007 to today

Before beginning our analysis of the FRA’s activities with the purpose of determining whether or not they are carried out within the scope of the Agency’s work as defined in art. 3 of its founding regulation, it is necessary to offer some initial remarks. The following analysis will focus mainly on the FRA’s reports and opinions. The restriction of our analysis to certain FRA’s activities is due to the fact that the Agency’s research projects and surveys are consistent with the limitations determined in the MAF and they offer reliable data

⁷² Notably the European Parliament in the *motion for a resolution on an EU Homelessness Strategy* B7-0475/2011 14 September 2011 stated that it “urges the EU Agency for Fundamental Rights (FRA) to work more on the implications of extreme poverty and social exclusion in terms of access to and enjoyment of fundamental rights, bearing in mind that the fulfilment of the right to housing is critical for the enjoyment of a full range of other rights, including political and social rights”. Available at <http://www.europarl.europa.eu>.

⁷³ See Opinion of the Management Board of the EU Agency for Fundamental Rights on the European Commission’s proposal for a new multi-annual framework (2013– 2017) for the agency. Available at <http://fra.europa.eu>.

for the assessments conducted in the Opinions, Reports and Handbooks. From a quantitative perspective, up to the entry into force of the Lisbon Treaty the FRA concluded 12 research projects (5 in the area of racism, xenophobia and related intolerance, 4 in the area of asylum, immigration and integration of migrants, 2 in the area of discrimination based on sex, race or ethnic origin, religion or belief, disability, age or sexual orientation and against persons belonging to minorities and any combination of these grounds), and 1 in the area of information society and, in particular, respect for private life and protection of personal data. It also concluded 2 surveys (in the areas of racism, xenophobia and related intolerance and discrimination). After the Lisbon Treaty became legally binding it carried out 17 research projects (1 addressing the need to support the implementation of fundamental rights at the local and regional level with concrete tools and good practice examples, 6 focusing on the area of discrimination, 1 on the area of access to justice, 3 on the area of victims of crime, 3 on the area of immigration and integration of migrants, visa and border control and asylum, 1 on the area of Roma integration, and 2 on the area of information society); as well as 4 surveys (1 on Roma integration, 1 on victims of crime, and 2 on discrimination and racism). Currently the FRA has 13 on-going projects: 4 in the area of access to justice, 2 in the area of asylum, migration and border, 4 in discrimination and racism areas (2 on person with disabilities, 1 on racism and relating intolerance, 1 on Roma discrimination), and 2 on information society, privacy and data protection. At first glance this data illustrates the preventive nature of the Agency's work. By collecting data and information, the Agency offers to the EU institutions, as well as to the Member States and stakeholders, a comprehensive instrument for assessing the state of affairs of EU policies and of their implementation by the Member States within the limit of its mandate. However, it has to be clear if the introduction of the Charter as a legally binding instrument and the collapse of the three pillars system, brought any transformation to the Agency's activities, especially due to the complex evolution of the notion of implementation, as summarily delineated above.

1. The Agency's activities prior to the entry into force of the Lisbon Treaty

The first task that will be taken into account is - according to art 4(d) of the founding regulation – “[to] formulate and publish conclusions and opinions on specific thematic topics, for the Union institutions and the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council or the

Commission”⁷⁴. Since the FRA has been established it has issued 13 opinions (4 before the entry into force of the Treaty of Lisbon and 9 after the treaty became legally binding). As regards the four opinions issued before the entry into force of the Treaty, they were not focused on proposals for directives or regulations but rather on framework decisions and on the draft of the Stockholm Programme. This means both that from the very beginning the FRA analysis was dedicated to assess EU policies and legislative acts designed to harmonize specific areas of protection of fundamental rights and, also, that the EU institutions immediately requested the FRA to work in the former third pillar area.

The first FRA opinion was issued on the 1st April 2007 and concerned “the Framework Decision on Combating Racism and Xenophobia”.⁷⁵ It was requested by the European Parliament's Committee on Employment and Social Affairs on the occasion of the European Parliament's Public hearing "The Framework Decision on Combating Racism and Xenophobia", held on 19th March 2007. The FRA in accordance with the previous EUMC encouraged the European Council of Minister to adopt the Framework Decision (COM 2001/664) proposed by the European Commission in November 2001 on defining a common criminal law approach to racism and xenophobia in the EU. The idea was to introduce a common framework for effective, proportionate and dissuasive criminal penalties. Through this opinion the FRA served its mandate to continue the work of the EUMC on racism, xenophobia and other forms of intolerance⁷⁶. This is a clear example of a FRA advisory contribution made possible by a specific request from a relevant EU institution involving matters that fall outside its mandate because covered by the former third pillar.

In the field of non-discrimination, on the 20th November 2007 the FRA made a contribution following a request by the European Parliament's Committee on Employment and Social Affairs to the Public Hearing "Progress made in equal opportunities and non-discrimination in the European Union"⁷⁷. On this occasion, and in light of the MAF, the FRA summarized relevant data and information testifying to the existence of ethnic discrimination in employment in the EU, and gave an overview of measures to combat employment discrimination and diversity management practices by employers and trade union activities.

⁷⁴ FRA Founding Regulation, art. 4(d).

⁷⁵ FRA Opinion on the Framework Decision on Combating Racism and Xenophobia (01/04/2007). Available at <http://fra.europa.eu>.

⁷⁶ “As the Agency is to be built upon the existing European Monitoring Centre on Racism and Xenophobia, the work of the Agency should continue to cover the phenomena of racism, xenophobia and anti-Semitism, the protection of rights of persons belonging to minorities, as well as gender equality, as essential elements for the protection of fundamental rights”. FRA Founding Regulation, Tenth Recital, *Preamble*.

⁷⁷ FRA Opinion Progress made in equal opportunities and non-discrimination in the European Union (20/11/2007). Available at <http://fra.europa.eu>.

The FRA's opinion (28/10/2008) on the Commission's proposal (COM (2007) 654) for a Council framework decision on the use of Passenger Name Record (PNR) data is also relevant in this context:

“The proposal aims to harmonize Member State's provisions on obligations for air carriers operating flights to or from the territory of at least one Member State regarding the transmission of PNR data to the competent authorities for the purpose of preventing and fighting terrorist offences and organized crime. All processing of PNR data under the proposal will be governed by the Council Framework Decision (xx/xx) on the Protection of Personal Data Processed in the Framework of Police and Judicial Cooperation in Criminal Matters”⁷⁸.

This opinion is another case in which one of the EU Institutions - the French Presidency of the EU Council - in accordance with the Agency's Founding Regulation, requests the FRA's advisory support in matters, which fall outside its remit. Another significant Opinion⁷⁹ was requested by the Swedish Presidency on the "draft of the Stockholm Programme"⁸⁰, which was subsequently adopted at the EU summit in December 2009. The Agency in its Opinion suggested to better mainstream fundamental rights protection throughout the whole Program: “Only a strong common reading of fundamental rights protection, especially in the area of procedural safeguards in criminal law, will allow for a sustainable level of sufficient mutual trust between the different national systems, and indeed trust in the Union”⁸¹. In line with this Opinion, when the Commission presented its proposal (COM (2009) 262 final) the FRA reacted by drafting the opinion paper "FRA Comments on the Presidency Draft Stockholm Programme" (29/07/2009).⁸² The Opinion included a series of possible amendments to the proposal. This is an interesting example of the FRA's role as guardian of fundamental rights integration within the EU policies. Indeed, FRA is seen as an important tool for monitoring the process of fundamental rights integration into the work of the relevant EU institutions⁸³. However, the strong limitations inherent within its Founding Regulation and in its MAF restrain its powers.

⁷⁸ FRA Opinion on proposal for a Council Framework decision on the use of Passenger Name Record (PNR) data for law enforcement purposes, (28/10/2008). Available at <http://fra.europa.eu>.

⁷⁹ FRA Opinion on the Stockholm Programme (29/07/2009). Available at <http://fra.europa.eu>.

⁸⁰ See Communication “An area of freedom, security and justice serving the citizen”, COM (2009) 262/4, 10 June 2009.

⁸¹ FRA Opinion on the Stockholm Programme, *supra* note 80.

⁸² FRA Comments on the Presidency Draft Stockholm Programme (03/11/2009). Available at <http://fra.europa.eu>.

⁸³ See O. De Shutter, *The Implementation of the Charter by the Institutions of the European Union*, CRIDHO Working Paper 2013/1.

From the foregoing, it is now possible to draw a few considerations. The FRA can only deliver opinions that fall within its remit, with the exception of those opinions that are requested by the EU relevant institutions, in accordance with its Founding Regulation. The primary function of these opinions is to assess the drafting proposals and to promote a better implementation of fundamental rights within the EU policies. Indeed, it is not a coincidence that the FRA is called to deliver opinions on matters that are included in limited areas, where the EU holds the authority to create policy and legislation on specific fundamental rights issues, such as discrimination or data protection.

The second issue that we now turn to is the publication of reports on fundamental-rights issues (see art. 4(e)(f)(g) of the FRA's founding regulation). The FRA prepares three different types of reports: thematic reports, comparative reports and annual reports. It also produces a fourth type of report that deals with specific issues. Even before the Charter was legally binding, the thematic reports were mainly focused on the thematic areas of the MAF and were related to a title of the EU Charter of Fundamental Rights. The Agency published only one thematic report in 2008. It focused on "Community Cohesion at local level: Addressing the needs of Muslim Communities"⁸⁴, which is included within the thematic area of non-discrimination and is related to the Equality Charter's title. The report assessed the implementation of policies by using political and social analysis rather than legal analysis. As its introduction explains:

"This publication provides a number of examples of good practice or initiatives at the local level from across European cities. They illustrate models of mainstreaming anti-discrimination and social cohesion. They highlight that some municipalities and regions target their integration policies/strategies toward Muslim communities, while others apply generic integration policies/strategies towards ethnic minorities. There are valuable lessons to be learned and shared with municipalities and regions across Europe"⁸⁵.

The report aims to offer an assessment of good practices and bad practices within the EU. It compares good policies and bad policies through indicators defined by the Agency's group of experts thus pointing out the best performing and worst performing Member State⁸⁶.

⁸⁴ FRA thematic report, Community Cohesion at local level: Addressing the needs of Muslim Communities, (March 2008). Available at <http://fra.europa.eu>.

⁸⁵ *ibid.*

⁸⁶ An interesting criticism to the Agency's work is provided by B. Sokhi-Bulley, Government (ality) by Experts: Human Rights as Governance, (2011) 22/3 Law Critique, 251. See also B. Sokhi-Bulley, *The Fundamental Rights Agency of the European Union: A New Panopticism*, (2011) 11/4 H.R.L.R., 683.

Alternatively, the comparative reports offer a comprehensive review of specific issues. In June 2007, before the Charter was legally binding, the European Parliament requested the FRA to draft a comparative report on homophobia and discrimination based on sexual orientation in the Member States of the European Union. The aim of this report was to assist the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament in discussing the need for a Directive covering all grounds of discrimination listed in Article 13 of the EC Treaty for all sectors referred to in the Racial Equality Directive 2000/43/EC. The report is composed of two parts: the first part is the previous publication, which contains a comprehensive comparative legal analysis of the situation in the European Union Member States drafted by Professor Olivier De Schutter, as well as conclusions and opinions for which the Agency is responsible; the second part consists in a comprehensive sociological analysis, based on both available secondary sources and interviews with key actors. Interestingly, the report begins by stating that

“the objective of the Agency is to provide assistance and expertise to relevant institutions, bodies, offices and agencies of the Community and its Member States, when implementing Community law relating to fundamental rights. In this context the European Parliament asked in June 2007 the Fundamental Rights Agency to launch a comprehensive report on homophobia and discrimination based on sexual orientation in the Member States of the European Union”⁸⁷.

Here the notion of implementation is understood *strictu sensu* in accordance with the formulation included in the FRA founding regulation. The same understanding is evident in the other comparative reports prior to the Lisbon Treaty.

In July 2007, the European Commission asked the FRA to develop indicators to measure how the rights of the child are implemented, protected, respected and promoted in the EU Member States. Subsequently, the European Commission requested that the Agency start collecting data on the basis of these indicators⁸⁸. It was then determined that the FRA's first thematic study on the rights of the child would focus on child trafficking.

In December 2007 the European Commission asked the FRA to develop a comparative report on the situation of Roma and Travellers across the European Union. In response, the FRA decided to focus on the housing situation after consultation with relevant actors, including the European Commission and the Council of Europe. In October 2009 the

⁸⁷ FRA comparative report, Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States Part I – Legal Analysis, (June 2008). Available at <http://fra.europa.eu>.

⁸⁸ FRA comparative report, Child Trafficking in the EU - Challenges, perspectives and good practices, (July 2009). Available at <http://fra.europa.eu>.

Agency published “Housing conditions of Roma and Travellers in the European Union”. In the report is further clarified that the Charter of Fundamental Rights confirms that

“the EU recognizes a right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. However, the charter addresses the Member States only when they are implementing Union law. Rights like the one at stake have to be read in accordance with the rules laid down by Union law and national laws and practices. Throughout the Member States there are different approaches to the right to housing in their domestic legal orders”⁸⁹.

As a result of the joint action on freedom of movement and migration of Roma initiated in 2008 by the European Union Agency for Fundamental Rights, the Council of Europe Commissioner for Human Rights (CommHR), the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the OSCE High Commissioner on National Minorities (HCNM), the Agency published two comparative reports in November 2009: “the situation of Roma EU citizens moving to and settling in other EU Member States” and “Selected positive initiatives - The situation of Roma EU citizens moving to and settling in other EU Member States”⁹⁰.

The FRA’s comparative reports extensively cite the Charter, although it only has a political value, either as a general point of reference concerning the EU fundamental rights, or with reference to its specific provisions. This approach is explained by the fact that the reports take into account the Charter, in light of its imminent entry into force in the aftermath of the Lisbon Treaty, and the favourable EU accession to the ECHR. In terms of an understanding of “implementation”, it is important to note that the report adopts a strict interpretation of the concept.

Among the fruits of the Agency’s work the annual reports are the most interesting for the purpose of our inquiry. The annual reports deal with the full spectrum of fundamental rights in accordance with its legal basis (MAF and Founding Regulation). Before the entry into force of the Lisbon Treaty the annual reports were strongly focused on discrimination issues and on the analysis of the level of implementation of relevant non-discrimination principles. The first annual report published in 2008⁹¹ explored the following themes and issues through highlighting examples of good practice: legal and institutional initiatives against racism and discrimination; racist violence and crime; racism and discrimination and

⁸⁹ FRA comparative report, Housing conditions of Roma and Travellers in the European Union, (October 2009). Available at <http://fra.europa.eu>.

⁹⁰ FRA comparative report, The situation of Roma EU citizens moving to and settling in other EU Member States, (November 2009). Available at <http://fra.europa.eu>.

⁹¹ FRA Annual Report 2008, (June 2008). Available at <http://fra.europa.eu>.

preventive initiatives in employment, education, housing and health care; and developments in EU policy and legislation relevant to combating racism and xenophobia. In the report there is no mention of the implementation of fundamental rights except as regards the principle of discrimination; the Charter is not mentioned at all. In 2009 a new annual report was published⁹². Whereas it still mainly focused on discrimination and equality issues, one part of it is devoted to the thematic areas included in the MAF. The report began to contain references of the Charter of Fundamental Rights. However, the case law of the ECJ, which was cited within the report, remained primarily focused on the principle of non-discrimination rather than fundamental rights in general.

2. The Agency's activities post the entry into force of the Lisbon Treaty

After the entry into force of the Lisbon Treaty the Agency started to issue opinions on the Commission's proposals for EU legislative acts such as directives and regulations.

The first post-Lisbon opinion from the Agency concerned the issue of body scanners⁹³ and was originally drafted on the occasion of a Public Consultation on the matter launched by the European Commission at the turn of 2008–2009. On 15th June 2010 the Commission published its Communication on the use of security scanners at EU airports COM (2010) 311 which included references to the reservations expressed by the European Data Protection Supervisor (EDPS), the Article 29 Data Protection Working Party, and the FRA. After the Commission had sent the Communication to the Council and the European Parliament, the FRA issued its contribution to the public consultation on 27th July 2010 (which it originally delivered to the Commission in February 2009).

It is worthy to note that even though the Lisbon Treaty entered into force, the Agency's legal framework, and therefore its remit, was not amended. Therefore, on matters concerning the former third pillar and upon request of the European Parliament, the FRA issued an opinion on the draft directive regarding the European Investigation Order (EIO) in criminal matters (14 February 2011). The draft directive was conceived with the purpose to replace an existing fragmented regime with a more comprehensive legislative instrument providing a mutual recognition of warrants for both existing and new evidence. The same

⁹² FRA Annual Report 2009, (June 2009). Available at <http://fra.europa.eu>.

⁹³ FRA Opinion on The use of body scanners: 10 questions and answers (27/07/2010). Available at <http://fra.europa.eu>.

year the Parliament requested from the Agency another opinion,⁹⁴ this time dealing with the Proposal for a Directive on the use of PNR data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime and its compliance with the Charter of Fundamental Rights of the European Union⁹⁵. The FRA was thus requested to follow up⁹⁶ on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime. On 5th September 2012, the Parliament also requested from the FRA an analysis of the fundamental rights issues associated with the proposed EU data protection reform package. The FRA opinion looked at both the draft regulation and directive as part of one single data protection “reform package”⁹⁷.

The Parliament, as the main interlocutor of the FRA, requested three other notable opinions from the FRA. The first was focused on the Proposal for a regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships⁹⁸⁹⁹. The request was based on an initiative of the Committee responsible for the legislative file, the Committee on legal affairs. The second concerned the European Commission proposal for a Directive on the freezing and confiscation of proceeds of crime in the European Union¹⁰⁰. In this case the European Parliament requested advice from the FRA on the extent to which confiscation of proceeds of crime could be implemented without breaching fundamental rights. The last was the opinion on the proposal to establish a European Public Prosecutor’s Office (EPPO) mandated to prosecute crimes against the financial interests of the European Union, a proposal that raised a number of fundamental rights issues.

Finally, the FRA delivered two opinions on its own initiative: the opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives and an opinion assessing the impact of the Framework Decision on the

⁹⁴ FRA Opinion on the proposal for a Passenger Name Record (PNR) Directive (15/06/2011). Available at <http://fra.europa.eu>.

⁹⁵ Proposal for a Directive of the European Parliament and of the Council on the use of Passenger Name Record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime COM(2011) 32 final.

⁹⁶ This was a follow-up request to the opinion of the FRA related to PNR from October 2008.

⁹⁷ FRA Opinion on proposed EU data protection reform package (09/10/2012). Available at <http://fra.europa.eu>.

⁹⁸ FRA Opinion on proposed EU regulation on property consequences of registered partnerships. Available at <http://fra.europa.eu>.

⁹⁹ Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes COM (2011) 126 final and Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships COM (2011) 127 final.

¹⁰⁰ FRA Opinion on the confiscation of proceeds of crime, 04/12/2012. Available at <http://fra.europa.eu>.

rights of the victims of crimes motivated by hatred and prejudice, including racism and xenophobia¹⁰¹.

After the entry into force of the Lisbon Treaty the FRA seems to have strengthened its relationship with the EU Parliament. Furthermore, the Charter became extensively used as standard for the FRA's assessments. Finally, with regards to the notion of implementation, since 2010 the FRA has highlighted in its opinions, the formulations of article 2 and 3 of the Founding Regulation "when implementing Community Law". Therefore, it seems that the Agency follows the narrow concept of implementation without moving to the (broader?) notion of "within the scope of Union Law".

Between 2010 and 2013 the Agency published five thematic reports and seven comparative reports. In September 2010, two thematic reports were published on the thematic area "Asylum, migration and borders": "The duty to inform applicants about asylum procedures: The asylum-seeker perspective" and "Access to effective remedies: The asylum-seeker perspective"¹⁰². Both the reports refer to Title II "Justice" and Title VI "Freedom" of the Charter. Alike the comparative reports, which cited the Charter before it had been legally binding, this is the first time that the Charter's provisions are explicitly mentioned in a thematic report. The report is also one of the products of the research project "The asylum seeker perspective: access to information and effective remedies" started in December 2009.

In November 2010 the Agency published another thematic report as part of another research project¹⁰³ in the area of "Asylum, migration and borders"¹⁰⁴ and concerning Title II "Freedom", Title III "Equality" and Title VI "Justice". The report examined law and practice in the 27 EU Member States on the deprivation of the liberty of irregular migrants pending their removal against the backdrop of applicable international human rights law.

¹⁰¹ FRA Opinion on the situation of equality in the European Union 10 years on from initial implementation of the equality directives (01/10/2013); FRA Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime (15/10/2013). Available at <http://fra.europa.eu>.

¹⁰² FRA Thematic Report, The duty to inform applicants about asylum procedures: The asylum-seeker perspective (September 2010), FRA Thematic Report, Access to effective remedies: The asylum-seeker perspective (September 2010). Available at <http://fra.europa.eu>.

¹⁰³ FRA Project "Rights of irregular immigrants in return procedures" (started 1 March 2009). Available at <http://fra.europa.eu>.

¹⁰⁴ Thematic Report, Detention of third country nationals in return procedures (November 2010). Available at <http://fra.europa.eu>.

Within the thematic area of “Asylum, migration and borders” but with reference to Title I “Dignity” and Title II “Liberty”, the Agency devoted a report (March 2011) to “the situation of persons crossing the Greek land border in an irregular manner”¹⁰⁵.

Finally, the Agency tackled the effectiveness of responses by public authorities, civil society organizations and others to counter racism, discrimination, intolerance and extremism in Greece and Hungary with the report “Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary”¹⁰⁶ which referred to Title I Dignity, Title II Liberty, Title III Equality, and Title VI Justice of the Charter.

The last two mentioned reports were not simply focused on a specific thematic area but concerned the performance of specific Member States. The Agency used this approach in other reports,¹⁰⁷ focusing its attention on States from the perspective of level of performance in protecting a particular right.

¹⁰⁵ FRA Thematic Report, Coping with a fundamental rights emergency - The situation of persons crossing the Greek land border in an irregular manner (March 2011). Available at <http://fra.europa.eu>.

¹⁰⁶ FRA Thematic Report, Racism, discrimination, intolerance and extremism: learning from experiences in Greece and Hungary (December 2013). Available at <http://fra.europa.eu>.

¹⁰⁷ Incident Report – Violent Attacks Against Roma in the Ponticelli district of Naples, Italy (August 2008); EU-MIDIS at a glance - Introduction to the FRA's EU-wide discrimination survey ; Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States: Part II - The Social Situation ; Housing discrimination against Roma in selected EU Member States - An analysis of EU-MIDIS data ; Selected positive initiatives - The situation of Roma EU citizens moving to and settling in other EU Member States ; EU-MIDIS Main Results Report (2009) ; Discover the past for the future – The role of historical sites and museums in Holocaust education and human rights education in the EU ; Towards More Effective Policing, Understanding and preventing discriminatory ethnic profiling: A guide ; Experience of discrimination, social marginalisation and violence: A comparative study of Muslim and non-Muslim youth in three EU Member States ; Racism, ethnic discrimination and exclusion of migrants and minorities in sport: the situation in the European Union ; Developing indicators for the protection, respect and promotion of the rights of the child in the European Union (Conference edition) ; The right to political participation of persons with mental health problems and persons with intellectual disabilities ; Excursion to the past - teaching for the future: handbook for teachers (2010); Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States ; Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States ; Migrants, minorities and employment - Exclusion and discrimination in the 27 Member States of the European Union (Update 2003-2008) ; Respect for and protection of persons belonging to minorities 2008-2010 ; Migrants in an irregular situation: access to healthcare in 10 European Union Member States ; Human rights education at Holocaust memorial sites across the European Union: An overview of practices ; The legal protection of persons with mental health problems under non-discrimination law (2011); The Racial Equality Directive: application and challenges ; The situation of Roma in 11 EU Member States - Survey results at a glance ; Involuntary placement and involuntary treatment of persons with mental health problems ; Choice and control: the right to independent living ; Making hate crime visible in the European Union: acknowledging victims' rights ; Access to justice in cases of discrimination in the EU – Steps to further equality (2012) ; Inequalities and multiple discrimination in access to and quality of healthcare ; Fundamental rights at Europe's southern sea borders ; EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Results at a glance ; Legal capacity of persons with intellectual disabilities and persons with mental health problems ; EU solidarity and Frontex: fundamental rights challenges ; Technical report: FRA survey - Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism ; Discrimination and hate crime against Jews in EU Member States: experiences and perceptions of antisemitism (2013) ; Roma Pilot Survey – Technical report: methodology, sampling and fieldwork ; Access to data protection remedies in EU Member States ; Violence against women: an EU-wide survey - Survey methodology, sample and fieldwork. Technical report; Violence against women: an EU-wide survey. Main results report; Criminalisation of migrants in an irregular situation and of persons engaging with them ; The right to political participation for

Since the Lisbon Treaty entered into force the Agency has published seven comparative reports. In particular in May 2010 the FRA published four reports¹⁰⁸ focused on issues (institutions and EU legislation) that contribute to the overarching architecture of fundamental rights in the European Union. The building blocks of this fundamental rights landscape are the data protection authorities and national human rights institutions (NHRIs), as well as Equality Bodies set up under the Racial Equality Directive (2000/43/EC). The Racial Equality directive invites the FRA to contribute to the European Commission's reporting on its impact on the ground. Art. 17 of the Directive states:

“The Commission's report shall take into account, as appropriate, the views of the European Monitoring Centre on Racism and Xenophobia [now the EU Fundamental Rights Agency], as well as the viewpoints of the social partners and relevant non-governmental organizations. In accordance with the principle of gender mainstreaming, this report shall, inter alia, provide an assessment of the impact of the measures taken on women and men. In light of the information received, this report shall include, if necessary, proposals to revise and update this Directive”¹⁰⁹.

It is in light of this provision that the Agency published the comparative report entitled “The impact of the Racial Equality Directive - Views of trade unions and employers in the European Union”¹¹⁰.

In November 2010 upon a request from the European Parliament the FRA updated its report on comparative legal analysis of discrimination on the basis of sexual orientation and gender identity (first published in June 2008)¹¹¹. Within the December 2010 research project “Separated asylum-seeking children: An examination of living conditions, provisions and decision making procedures in selected EU Member States through child centred participatory research” the FRA published the report “Separated, asylum-seeking children

persons with disabilities: human rights indicators ; EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Main results ; Fundamental rights at land borders: findings from selected European Union border crossing points ; Fundamental rights at airports: border checks at five international airports in the European Union ; Being Trans in the EU - Comparative analysis of the EU LGBT survey data (2014) ; Victims of crime in the EU: the extent and nature of support for victims (January 2015). Available at <http://fra.europa.eu>.

¹⁰⁸ “The impact of the Racial Equality Directive - Views of trade unions and employers in the European Union”, “National Human Rights Institutions in the EU Member States”, “Data Protection in the European Union: the role of National Data Protection Authorities” and “EU-MIDIS Data in Focus Report 3: Rights Awareness”. Available at <http://fra.europa.eu>.

¹⁰⁹ Art. 17, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000], OJ L 180.

¹¹⁰ FRA Comparative Report, The impact of the Racial Equality Directive - Views of trade unions and employers in the European Union (May 2010). Available at <http://fra.europa.eu>.

¹¹¹ FRA Comparative Report, Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity (November 2010). Available at <http://fra.europa.eu>.

in European Union Member States”¹¹². In March 2011 it also published “Access to justice in Europe: an overview of challenges and opportunities”¹¹³ as a product of the research project “Accessing efficient and independent justice – legal and sociological analysis”.

Finally, the comparative report “Fundamental rights of migrants in an irregular situation in the European Union” was published in November 2011 within the project “The situation of migrants in an irregular situation in the European Union”¹¹⁴. In this comparative report, the FRA - in the paragraph devoted to EU law - specified its methodology by stating:

“When analysing the protection of the rights of migrants in an irregular situation, the first issue is to determine whether or not this is an area covered by Union law. The answer to this question determines whether the Charter of Fundamental Rights of the European Union applies. According to Article 51, the Charter applies to EU institutions and EU Member States *only when they are implementing Union law*”¹¹⁵.

The report further explains the notion of implementation included in art. 51 of the Charter by quoting the *Kremzow* case of the ECJ. According to the Court, Member States must respect fundamental rights wherever “national legislation falls *within the field of application of Community law*”¹¹⁶. In addition it states,

“The entry into force of the Charter does not change matters. In all other cases outside the scope of Union law, fundamental rights are guaranteed at national level by national constitutional systems and by applicable international human rights law and labour law provisions”¹¹⁷.

In the annual reports we find a divergent approach to the notion of implementation. On one hand, the reports adopt the notion of implementation as laid down in the Charter but, on the other, they side with the account of the ECJ as regards the thematic areas within its remit. In the report “Fundamental rights: challenges and achievements in 2011”¹¹⁸, it is explained: “The CJEU may give its opinion on the interpretation or the validity of EU legisla-

¹¹² FRA Comparative Report, Separated, asylum-seeking children in European Union Member States (December 2010). Available at <http://fra.europa.eu>.

¹¹³ FRA Comparative Report, Access to justice in Europe: an overview of challenges and opportunities (March 2011). Available at <http://fra.europa.eu>.

¹¹⁴ FRA Comparative Report, Fundamental rights of migrants in an irregular situation in the European Union (November 2011). Available at <http://fra.europa.eu>.

¹¹⁵ FRA Annual Report, Fundamental rights: challenges and achievements in 2010 (November 2011). Available at <http://fra.europa.eu>.

¹¹⁶ Case C-299/95, *Kremzow* [1997] ECR I-2629, par 15.

¹¹⁷ FRA Annual Report 2010, *supra* note 112.

¹¹⁸ FRA Annual Report, Fundamental rights: challenges and achievements in 2011 (June 2012). Available at <http://fra.europa.eu>.

tion, thereby enabling the national court to apply the correct interpretation of EU law in a specific case. It will also review whether a Member State is complying with the Charter of Fundamental Rights and general principles of EU law *when implementing EU law or acting within the scope of EU law*¹¹⁹. The Agency's activity follows the evolution of the case law of the ECJ, as well as national and supranational legislation, promoting instruments for a better use of the fundamental rights, enshrined in the Charter of the decisions of the national Courts and in the measures taken by the national authorities¹²⁰. In its 2012 Annual Report the Agency, refers also to the Dereci and Fransson cases as regards a wider interpretation of art. 51(1) of the Charter: "In this sense, the CJEU might look at the fundamental rights compliance of national acts that do not explicitly implement or transpose Union law but share a specific purpose with a piece of Union law"¹²¹.

At this juncture it should be pointed out that the FRA is a victim of the same difficulties related to the concept of implementation that we have met when we tried to identify a linearity of understanding among the decisions of the ECJ. Indeed, the FRA understanding of what the concept of implementation means is obscure and unsettled: it constantly swings between a strict and a broad interpretation. This inconsistency needs to be acknowledged and addressed. The Agency's work has the potential to be a useful tool but it suffers from inconsistencies that pose an obstacle to its reception as a credible and coherent body of research. In light of this consideration Gabriel Toggemburg has stated:

"Since the Agency cannot deliver any legally binding decisions and does not assess infringements of the member states, but is merely consultative in nature, it would be rather strange if its scope would not extend—in conformity with the case law of the court—to all national law falling in the field of application of EC law"¹²².

However, at stake here is the FRA's credibility before the EU Member States. They tend to see the FRA more as a surveillance body rather than as an advisory institution (as the reservations which emerged at the EU Council for the approval of the second MAF proved).

¹¹⁹ *ibid.*

¹²⁰ "EU law is often the result of difficult compromises achieved after long negotiations, so sometimes it is vague or contains broad scope for exceptions or derogation at national level... It would therefore be useful to introduce, especially in policy contexts that are sensitive in terms of fundamental rights, explanations that can guide national authorities in implementing EU legislation in a way that avoids violating fundamental rights". FRA Annual Report Fundamental rights: challenges and achievements in 2013 (June 2014) available at <http://fra.europa.eu>.

¹²¹ FRA Annual report: Fundamental rights: challenges and achievements in 2012 (June 2013). Available at <http://fra.europa.eu>.

¹²² G. Toggemburg, *Exploring the Fundament of a New Agent in the Field of Rights Protection: The F(undamental) R(ights) A(gency) in Vienna*, European Yearbook of Minority Issues Vol 7, 2007/8.

The concept of implementation thereby continues to be elusive and needs to be clarified and refined.

In conclusion: what if the European Union acceded to the
European Convention of Human Rights and Fundamental Freedoms?

The Agency has more than once mentioned in its opinions and reports that its activities are carried out, among other things, in light of the future EU accession to the European Convention of Human Rights. In fact the Lisbon Treaty provides an obligation (art. 6(2) TEU) for the European Union to accede to the European Convention of Human Rights with the consequence of integrating the ECHR into the fundamental rights protection system. In other words the EU will be bound to respect the ECHR and its acts will be subjected to the external control of the European Court of Human Rights complementing the EU internal system of fundamental rights protection governed by EU law and the Court of Justice. In doing so it will partake in a more coherent framework for protecting human rights within the European system, a framework which will avoid overlaps between the two Courts (the Strasbourg Court and the Luxembourg Court) and which will enable citizens to take action against the activities of the EU before the ECtHR. However, this new step has significant implications, especially as regards the relations between the two Courts¹²³. What is relevant for our investigation into the Agency's work is the role that the Charter will play in relation to the ECHR¹²⁴. The Charter, often confused with the ECHR, enshrines not only rights derived from the ECHR and other international instruments but also rights from the Constitutional tradition of the European Member States. Therefore, alongside the traditional individual human rights, it incorporates social rights and political rights. Whereas both the Charter and the ECHR include overlapping human rights provisions, they operate within separate legal frameworks: the Charter is part of EU law and ultimately subject to interpretation by the ECJ, whereas the ECHR is an instrument of the Council of Europe in

¹²³ See T. Lock, *The ECJ and the ECtHR: The Future Relationship between the Two European Courts* (2009) 8 Law & Prac Int'l Cts & Tribunals, 375. J. R. Wetzel, *Improving Fundamental Rights Protection in the European Union: Resolving the Conflict and Confusion Between the Luxembourg and Strasbourg Courts*, (2013) 71/6 F.L.R., 2823. M. Kuijer, *The accession of the European Union to the ECHR: a gift for the ECHR's 60th anniversary or an unwelcome intruder at the party?* (2011) 3/4 Amsterdam Law Forum, 17-32. Available at <http://amsterdamlawforum.org/article/view/240>. V. Kosta, N. Skoutaris, V. Tzevelekos, *The EU accession to the ECHR* (Hart Publishing, 2014).

¹²⁴ See F. Jacobs, *The European Convention on Human Rights, the EU Charter of Fundamental Rights and the European Court of Justice, in The Future of the European Judicial System in a Comparative Perspective* (Nomos Verlag, 2006), 291.

Strasbourg, and is interpreted by the ECtHR¹²⁵. Furthermore, whilst the EU accession to the ECHR may be seen as a new opportunity to transform the EU supranational system into a federal system equipped with its own bill of rights, the Charter through its horizontal provisions – art. 51 and art 52 – prevents this possibility by strongly limiting the applicability of its rights to EU Member States’ domestic laws. However, the ECJ case law indicates that the Luxembourg Court may be keen to broaden the field of applicability of the Charter. In this context what is the role to be played by the Agency? May the EU accession to the ECHR be an opportunity to broaden the scope of the FRA’s work and to clarify the extent of its activities especially with regard to the Member States?

The FRA cooperates with the Council of Europe by virtue of a cooperation agreement adopted on 15th July 2008¹²⁶. The agreement was drafted with the purpose of preventing a duplication of the activities in the field of human rights on behalf of the Agency and to promote complementarity and cooperation between the Council of Europe and the FRA. It provides for the appointment of a contact person between the two institutions, the appointment of an independent person of the Council of Europe as a member of the Agency’s Management Board, and the invitation of the Council of Europe secretariat representatives to the meetings of the FRA’s Management Board. Further, representatives of the Agency can be invited to attend as observers in meetings of those Council of Europe inter-governmental committees in which the Agency has expressed an interest. The cooperation between the two institutions covers the whole range of the Agency’s activities, both present and future. In particular, the Agency and the Council of Europe are called to participate in regular consultations with the aim of coordinating the Agency’s activities, such as the preparation of the annual work program, and the Agency’s Annual Report on fundamental rights issues, that covers the Agency’s activity and operation with civil society. In the course of the consultations, the Agency and the Council of Europe may decide to conduct

¹²⁵ “There is, moreover, no doubt that within the EU, as compared with the present legal position, the accession of the EU to the ECHR will also strengthen Member States’ ties to the ECHR. As mentioned above, on the EU’s accession, the ECHR will be an integral part of the EU legal order and, in accordance with Article 216(2) TFEU, the primacy of EU law over national laws will extend to it. “In most cases this should have virtually no practical effect, since, irrespective of the EU’s accession to the ECHR (Article 6(2) TEU), numerous fundamental rights offering at least an equal, if not higher, level of protection than those of the ECHR are guaranteed under EU law, either in the framework of the Charter of Fundamental Rights (Article 6(1) TEU) or in the form of general legal principles (Article 6(3) TEU). All Member States are in any event bound, without restriction, to respect these fundamental rights of the EU when implementing EU law, as provided for in Article 51(1) of the Charter, regardless of whether or not they have, as contracting parties to the ECHR, made reservations under international law in respect of comparable provisions of the ECHR or the additional protocols thereto” Opinion 2/13 of the Court 18 December 2014, Opinion AG Kokott, par. 266, 267.

¹²⁶ Agreement between the European Community and the Council of Europe on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe (L 186/7) 15.7.2008 available at <http://fra.europa.eu>.

joint and/or complementary activities on subjects of common interest, such as the organisation of conferences or workshops, data collection and analysis, or the setting up of shared information sources or products. Between 2011 and 2014 the FRA and the Council of Europe jointly prepared 5 handbooks focused on non-discrimination, the establishment and accreditation of National Human Rights Institutions in the European Union, data protection law, European law relating to asylum, borders and immigration, and Guardianship for children deprived of parental care¹²⁷. The handbook on non-discrimination states in its introduction:

“With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the Lisbon Treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights is not only desirable but in fact essential for the proper national implementation of a key aspect of European human rights law: the standards on non-discrimination”¹²⁸.

In the Handbook on European law relating to asylum, borders and immigration it also stated: “improving the understanding of common principles developed in the case law of the two European courts, and in EU regulations and directives is essential for the proper implementation of relevant standards, thereby ensuring the full respect of fundamental rights at national level”¹²⁹. Since the very beginning and due to the fears clearly expressed by the Council of Europe on the eve of the Agency’s establishment, the FRA developed a systematic cooperation with the Council of Europe. This fostered complementarity between the two institutions and prevented duplications of their activities. The occurrence of the EU access to the ECHR may be a further opportunity for the Agency to clarify its borders and strengthen its role in the European context. The Agency may be a real instrument of harmonization within the renewed framework of human rights protection. It could cooperate with the Council of Europe by offering reliable data and information concerning funda-

¹²⁷ Handbook on European non-discrimination law (March 2011), Handbook on the establishment and accreditation of National Human Rights Institutions in the European Union (October 2012), Handbook on European data protection law (June 2014), Handbook on European law relating to asylum, borders and immigration (June 2014), Handbook on European law relating to asylum, borders and immigration (June 2014). Available at <http://fra.europa.eu>.

¹²⁸ Handbook on European non-discrimination law (March 2011). Available at <http://fra.europa.eu>.

¹²⁹ Handbook on European law relating to asylum, borders and immigration (June 2014). Available at <http://fra.europa.eu>.

mental rights protection at EU level, while it could also be an instrument of awareness as regards the applicability of the Charter in light of its relation with the ECHR¹³⁰.

¹³⁰ See S. Peers, *The Contribution of the EU Agency to Civil and Political Rights*, in P. Alston , O. De Shutter (eds), *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency* (Hart Publishing, 2005), 127.

Conclusions

Introduction – An Untapped Resource – Fundamental Rights Agency of the European Union’s potentialities – A new perspective.

Introduction

At the end of our itinerary, it is necessary briefly to retrace the main stages of our inquiry in order to draw conclusions. The FRA is a strategic tool in the field of human rights. Indeed, it is one of the reforms suggested by Joseph Weiler and Philip Alston in the report prepared for the *Comité des Sages*, which was responsible for “Leading by example: A Human Rights Agenda for the European Union for the Year 2000”. In this report, the Agency was indicated as “an indispensable element in any human rights strategy”¹.

As it has been explained in *the first Chapter*, the idea of creating a monitoring Agency in the field of fundamental rights within the European Union emerged as one of the possible remedies to some deficits in the Union. First of all, an increasing of the ECJ case law concerning fundamental rights was not counterbalanced by an adequate and consistent system of fundamental rights policies at EU level. Secondly, there is the need to strengthen the fundamental rights strategy to make the Union closer to its citizens in the era of EU enlargement. Thirdly, is the need to spread a common awareness of fundamental rights between the Member States and the institutions of the EU. As it has been delineated in the first Chapter, the process to establish the FRA was triggered by the Vienna crisis and it certainly was not a coincidence that the Agency was later placed and structured on the basis of the EU Monitoring Centre for Racism and Xenophobia, based in Vienna. Furthermore, with the first proclamation of the EU Charter of Fundamental Rights, and in view of the upcoming Constitutional Treaty, the Agency was conceived as an essential tool within the new constitutional framework. The intention to create an EU Agency committed in the field of fundamental rights did not disappear when the project of an EU Constitution failed. The second part of Chapter 1 attempts to retrace the phases that characterized the Agency’s establishment. The creation of the FRA was not generally welcomed. Indeed, if the European Commission and the European Parliament welcomed this initiative, it is also

¹ J. Weiler, P. Alston, *An 'Ever Closer Union' in Need of a Human Rights Policy*, (1998) 9 EJZL, 658.

true that one of its strongest opponents was the Council of Europe. As a consequence, the Agency came into light only in 2007 when its founding regulation was finally adopted. The Agency's founding regulation is thereby the result of a compromise achieved among the EU relevant institutions and the Council of Europe.

Chapter 2 analyses the current FRA's founding regulation in the light of the original proposal issued by the European Commission. The first part of the chapter is devoted to determine the objectives, the scope and the tasks of the FRA while the second part is focused on its structure, internal organization, financial arrangements and cooperation with other institutions. From this analysis, the final statute is quite narrow: the Agency, in carrying out its activities, cannot deal with matters concerning the former third pillar and its involvement within the mechanism of art.7 TEU is excluded. Furthermore, since its establishment precedes the entry into force of the EU Charter of Fundamental Rights, the visibility of the Charter within the FRA's Founding Regulation appears quite restrained. However, it has been pointed out that the Charter has an important influence on the scope of the Agency's activities. Art. 3(3) of the Founding Regulation with regards to the Member States, recalls the same concept of implementation found in art. 51(1) of the Charter. Notably, the concept of implementation as laid down in art. 51(1) of the Charter is even narrower than the scope of the Agency's activities. This is due to the fact that the Agency shall carry out its monitoring activities concerning the Member States "when they are implementing Community Law" rather than "when they are implementing Union Law". Such wording is likely the consequence of the pre-Lisbon foundation of the FRA that is conceived within the former system of competences. At the same time, this strict formulation is also the fruit of the fears expressed by some Member States and the Council of Europe concerning the scope of its monitoring activities.

Finally, *Chapter 3*, through a focus on the undetermined nature of concept of implementation as laid down in the Charter and in its explanations and as interpreted in the case law of the ECJ, analyses some of the main products of the Agency's activities such as its reports and opinions. Furthermore, to the purpose of our inquiry concerning the scope of the FRA's activities, it has been taken into account another important element of the Agency's internal legal framework such as the MAF. When the Agency is not exercising its tasks upon request of the EU institutions, it carries out its activities within the limits of the thematic areas laid down in the MAF. Therefore, the concept of implementation as expressed in art 3(3) of the Founding Regulation has to be tackled in light of these elements. The findings of such analysis show the increasing of FRA's activities since the entry into

force of the Lisbon Treaty and a reinforced cooperation with the EU institutions, particularly with the EU Parliament. Indeed, after the EU Charter of Fundamental Rights was legally binding, the FRA's activities have found a renewed impulse and its advisory assistance considerably more requested. However, regarding the concept of implementation, its contours, as they emerged from the Agency's reports and opinions, seem to be uncertain according to the attitude of the ECJ. The chapter concludes its itinerary considering the Agency's activities and scope in lights of the EU access to the ECHR. After analysing the handbooks as fruit of the joint cooperation between the Council of Europe and the Agency, it is argued that the EU access to the ECHR could offer the opportunity to the Agency to better define the contours of its scope of activity, and to play an important role of coordination of data and information gathering between the ECHR and the EU in the field of fundamental rights.

After having retraced the itinerary of the present research some conclusive reflections will now be drawn.

An Untapped Resource

In the conclusions of the external evaluation of the FRA published in 2012, the Agency is positively assessed. It is indeed stated:

“It can be concluded that the FRA has clearly fulfilled its mandate in addressing the needs for full respect of fundamental rights in the framework of European Union law, in relation to relevant institutions, bodies, offices and agencies of the Community. The evaluation findings show that the Agency is considered by European stakeholders to be a vital point of reference in the fundamental rights architecture in Europe, where it is seen as a unique provider of comparative, EU-wide reports and data in the field of fundamental rights, covering a need for objective and reliable information which was previously not catered for. The work of the FRA has contributed to a greater knowledge-base regarding fundamental rights issues among policy-/decision-makers and stakeholders in the European Union. The work of the FRA is found to be highly relevant and suitable to the information needs of stakeholders, in particular at the EU level and to some extent, among civil society. The FRA mainly works in fields where there are data gaps, in particular in terms of comparative information among Member States. The perceived objectivity of the FRA is appreciated by the stakeholders, and their role as an EU institution gives their work additional backing, for example compared to the work carried out by civil society or other actors in the field of fundamental rights”².

² Ramboll (2012), External evaluation of the European Union Agency for fundamental rights. Available at http://fra.europa.eu/sites/default/files/fra-external_evaluation-final-report.pdf.

The external evaluation report recognizes the essential role of the FRA within the EU fundamental rights architecture as a data and information gathering body, with a coordinating network able to assist the EU relevant institutions and the Member States when implementing Community law. However, the Agency is also considered “an untapped resource”³ as its full potentialities remain partially unexpressed. This is due to a series of reasons, which have to be seriously tackled.

First, the FRA exercises an essential advisory function within the framework of the MAF. Despite the case in which it is called upon by the EU relevant institutions to deliver an opinion or to draft a report, the FRA conducts its investigations within the limits of the thematic areas of the MAF. As the debate prior to the FRA’s establishment has shown, the FRA cannot deal of its own initiative with matters covered by the former third pillar, as the MAF does not include any thematic areas concerning Police and Judicial cooperation in criminal matters. Initially, this limitation of the FRA’s mandate was likely due to the organization of competences prior of the entry into force of the Lisbon Treaty. Indeed, as the FRA was an agency created on the basis of the flexibility clause, art. 308 TEC (now 352 TFEU), it possessed itself under the EC Treaty and it was able to operate under the limits of competence of the treaty, which did not include the former third pillar. Notably, after the entry into force of the Lisbon Treaty, that caused the collapse of the three pillars system and provided the legally binding status the EU Charter of Fundamental Rights, the Agency’s scope did not change. This is certainly seen “as inconsistent from the European citizens’ perspective, as this means that not all the fundamental rights included in the EU Charter on Fundamental Rights are covered by the mandate of the FRA, with potential issues such as detention, extraditions and situation of vulnerable groups high on the agenda”⁴.

Secondly, some commentators have considered the phrasing of the MAF as “unsystematic”⁵ and having a “hybrid nature”⁶. As it has been already pointed out, some thematic areas of the MAF are a mix of specific fundamental rights and others general policy areas. The Charter does not find its full expression within the MAF and thus such selection of the thematic areas could give the impression that the MAF considers some Charter’s rights and not others. This approach can be explained by the fact that the Charter was only a political instrument before the entry into force of the Lisbon Treaty, leaving to the EU insti-

³ *ibid.*

⁴ External evaluation, *supra* note 2

⁵ G. Toggenburg, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?*, EUI working papers, LAW 2013/13.

⁶ *ibid.*

tutions, in particular to the European Council, the autonomy to set up the structure of the MAF in accordance with the priorities of the EC. However, once again, after the Charter was legally binding the MAF was not subject to any particular change. In this context, the MAF could be considered as anachronistic⁷ and as preventing the Agency to achieve its role as a full Charter body.

Thirdly, as the “independent external evaluation report” has pointed out, the Agency is an “untapped resources” with regards to the EU legislative process:

“It was generally thought that the Agency is an untapped resource to this end, which could significantly contribute to safeguarding fundamental rights in the legislative process at European level. There were also several opinions regarding the independence of the FRA, which is seen as limited due to its dependency of the European Commission and restricted mandate in terms of issuing at its own initiative FRA opinions regarding legislation”⁸.

Indeed, according to art. 4(2) of the Agency founding regulation, the FRA can only deal with EU legislative drafts upon request of the EU institutions. Whereas FRA’s opinions on legislative proposals are drafted in complete independence, it is also true that such opinions can be delivered only when they are requested by the EU’s relevant institution thus strongly limiting the role of the Agency as a body scrutinizing the upcoming legislation.

Fourthly, certainly a possible solution to the difficulties mentioned above could be amending both the FRA’s Founding Regulation and the MAF. However, since both these legal documents are based on art. 352 TFEU (ex. Art. 308 TEC), the adoption of every amendment of little account would request the unanimity of votes at the European Council. This state of affairs leads to the fact that the FRA cannot be easily emendable and thus is subjected to the strict limitation of its internal legal framework.

Finally, another constraint to the FRA activity is the exclusion from the current founding regulation of the provision⁹ providing the FRA’s advisory expertise in cases of serious breach of the EU values (art.7 TEU), upon request from the European Council. Certainly, the Agency indirectly contributes to a preventive monitoring of the Member States’ per-

⁷ *ibid.*

⁸ External evaluation, *supra* note 2.

⁹ “The Agency shall make its technical expertise available to the Council, where the Council, pursuant to Article 7(1) of the Treaty on European Union, calls on independent persons to submit a report on the situation in a Member State or where it receives a proposal pursuant to Article 7(2), and where the Council, acting in accordance with the procedure set out in these respective paragraphs of Article 7 of the Treaty on European Union, has requested such technical expertise from the Agency”. Proposal for A Council Regulation establishing a European Union Agency for Fundamental Rights and Proposal for a Council Decision empowering the European Union Agency for Fundamental Rights to pursue its activities in areas referred to in Title VI of the Treaty on European Union COM(2005) 280 final.

formance through the publication of its annual reports, which are useful tools in the hand of the relevant EU institutions. However, the FRA could undoubtedly play an important role offering its expertise within the warning procedure of art. 7¹⁰.

Filling these gaps, which are not only the results of the strong debate developed in occasion of the drafting of the Agency's founding regulation but also of its birth, that occurred between the failure of the project of a European Constitution and the Treaty of Lisbon, would allow the FRA to convey the entire framework of its potentialities.

Fundamental Rights Agency of the European Union's potentialities

In light of the FRA's fragilities underlined above, it is now possible to draw some final reflections. The EU Charter of Fundamental Rights plays an important role within the FRA's architecture. After the entry into force of the Lisbon Treaty, the Charter started to be increasingly used as a point of reference in FRA's opinions and reports. However, a reference to the Charter is always made through the lens of the thematic areas included in the MAF and in accordance with the limited mandate of the Founding Regulation. This state of affairs can lead to a twisted perception regarding the scope of the FRA's activities. In order to avoid such misunderstanding, Gabriel Toggenburg suggests it would be necessary a "lisbonisation"¹¹ of the Agency's Founding Regulation and MAF. It is thereby important, especially given the new legally binding status of the Charter, to make the FRA more visible as a EU fundamental rights body that uses the EU Charter of Fundamental Rights as a main point of reference in its work. This would require rethinking the thematic areas of the MAF and considering their integration in areas devoted to social and political rights, as it was suggested by the FRA's Management Board in its opinion on the European Commission's proposal for a new multi-annual framework (2013-2017) for the Agency¹².

Furthermore, in light of the renewed post-Lisbon distribution of competences, judicial cooperation in political and criminal matters "has become part of the law of the Union and

¹⁰ See C. Closa, D. Kochenov, J.H.H. Weiler, *Reinforcing Rule of Law Oversight in the European Union*, EUI Working Paper RSCAS 2014/25.

¹¹ G. N. Toggenburg, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?* (December 2013). EUI Department of Law Research Paper No. 13. Available at SSRN: <http://ssrn.com/abstract=2368194> or <http://dx.doi.org/10.2139/ssrn.2368194>.

¹² Opinion of the Management Board of the EU Agency for Fundamental Rights on the European Commission's Proposal for a New Multi-Annual Framework (2013– 2017) for the Agency. See also Proposal for a Council Decision establishing a Multiannual Framework for the European Union Agency for Fundamental Rights for 2013-2017 COM(2011) 880 final.

are therefore covered by the scope of the tasks of the Agency”¹³. In particular, since the area of judicial cooperation in political and criminal matters involves a number of relevant issues concerning fundamental rights, it would be considered inconsistent to exclude these areas from the scope of the FRA’s work. Therefore, the MAF should be integrated with thematic areas concerning matters covered by the former third pillar.

The exclusion of matters covered by the former third pillar from the scope of activity of the FRA, is also related to the issue concerning the FRA’s “independence” that was mentioned above. As it is known, the Agency can deliver opinions on issues concerning judicial cooperation in criminal and political matters only upon request from the main EU institutions. Furthermore, it was also outlined that the MAF is the result of a European Council decision, thus, as far as the Agency carries out its activities in complete independence, it is also true that with regards to the determination of the MAF and the possibility to deliver opinions on matters concerning the former third pillar, its margin of *manoeuvre* is strictly defined by the EU institutions. Interestingly, in order to find a solution to these restrictions, Gabriel Toggenburg suggests that

“The list of FRA priority areas should neither be decided by the European Commission (as proposed by the Commission in 2005), nor by the Council (as is laid down in the current regulation), nor by the European Parliament (as proposed in a Parliament committee in 2006). It should rather be the agency itself which establishes – in close cooperation with the three EU institutions – a multiannual programme providing the necessary degree of prioritization”¹⁴.

This proposal would allow the FRA to work within a broader scope, in light of the new EU constitutional framework and objectives and with a certain degree of independence. Unfortunately, this proposal is destined to meet the difficulties that art. 352 TEU (ex art. 308 TEC) arises, given that it requires the unanimity of votes at the European Council to amend the MAF. In this respect, only amending the treaty and thus establishing the Agency on the basis of a new treaty provision would allow this step to be taken.

¹³ Recommendation on the draft Council decision establishing a Multiannual Framework for 2013-2017 for the European Union Agency for Fundamental Rights (10449/2012 – C7-0169/2012 – 2011/0431(APP)).

¹⁴ G. N. Toggenburg, *supra* note 11.

A new perspective

Notwithstanding the set of limitations that delimitate the FRA's field of activity, the EU's institutions increasingly begin to recognize its potential and to envisage future outcomes. A special opportunity for it was offered by the adoption of the new Hungarian Fundamental Law by the Hungarian Parliament on April 18th, 2011. The new Hungarian Constitution raised several concerns over its conformity with the rule of law and the democratic principle, and triggered a series of reactions on behalf of different institutional actors¹⁵. It also originated an important reflection on the EU's values that reaches its climax in 2013 with a series of proposals and ideas expressed by the European Commission, the European Parliament, ministers and other institutional actors. Notably, the FRA was considered as playing an important role in this context. In fact, as the European commission explained, the principle of rule of law includes the principle of "legality, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review *including respect for fundamental rights*, and equality before the law, within the principle of rule of law"¹⁶.

On the 3rd of July 2013, the European Parliament, in its Resolution¹⁷ on the situation of fundamental rights with regards to the Hungary's constitutional reform, called on the European Council, the European Commission and national parliaments to take action in order to protect the values of Article 2. Interestingly, among a series of recommendations addressed to these institutions, the European Parliament proposes also to rethink the mandate of the FRA with the purpose of entrusting the Agency to regularly monitor the compliance of Member States with art 2 TEU:

"the setting up of such a mechanism could involve a rethinking of the mandate of the European Union Agency for Fundamental Rights, which should be enhanced to include regular monitoring of Member States' compliance with Article 2 TEU; recommends that such a 'Copenhagen high-level group' or any such mechanism should build on and cooperate with existing mechanisms and structures; recalls the role of the European Union Agency for Fundamental Rights, which could bring together the highly valuable work of the various existing Council of Europe monitoring bodies and the Agency's own

¹⁵ See B. Bugarič, *Protecting Democracy and the Rule of Law in the European Union: The Hungarian Challenge*, (2014) 79 L.E.Q.S., 1. See also FOCUS - An EU internal strategic framework for fundamental rights: joining forces to achieve better results in Fundamental rights: challenges and achievements in 2013 - Annual report 2013 (June 2014). Available at <http://fra.europa.eu>.

¹⁶ Communication from the Commission, the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law Brussels, 19.3.2014 COM(2014) 158 final/2.

¹⁷ European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI)).

data and analysis in order to carry out independent, comparative and regular assessments of the EU Member States' compliance with Article 2 TEU”.

The Parliament then restates once more its intention to strengthen the FRA’s mandate. In particular, the extension of the FRA’s mandate would be additional and subsidiary to a new mechanism - setting up alongside the mechanism of art. 7 - to ensure compliance by all Member States with the common values as enshrined in art. 2 TEU and the continuity with the “Copenhagen criteria”.

“a form of ‘Copenhagen Commission’ or high-level group, a ‘group of wise men’ or an Article 70 TFEU evaluation, and build up on *the reforming and strengthening of the mandate of the European Union Agency for Fundamental Rights*, and on the framework of a strengthened Commission-Council-European Parliament-Member States dialogue on measures to be taken”¹⁸.

The same proposal was reiterated one year later in another Resolution of the European Parliament of 3 July 2013. According to the text of the Resolution, the European Parliament calls for the creation of a commission of experts – “Copenhagen commission” – entrusted to ensure the compliance by all member States with the common values enshrined in art. 2 TEU and with the Copenhagen criteria. In addition, the commission should also advise and report to the Parliament concerning the field of fundamental rights “pending the amendment the FRA Regulation to allow the Agency to have stronger powers and a wider remit, including monitoring individual Member States in the field of fundamental rights”.¹⁹

According to the European Parliament’s resolutions, the debate concerning a new mechanism for the respect of the rule of law within the EU, offered the opportunity to put the spotlight on the possibility to amend the FRA’s mandate. It is a clear evidence of what Vivien Reding, former Vice-President of the European Commission, declared at the Centre for European Policy studies:

“Member States could also be called upon to give the EU legislator greater powers as regards the mandate of the Fundamental Rights Agency. As you know, the FRA currently can only analyse fundamental rights issues at EU level and is barred from analysing national situations. The Council has even refused to amend the mandate of the FRA to include the justice and home affairs policies, as would be logical now that the Lisbon Treaty has entered into force. The unanimity rule for the mandate of the

¹⁸ *ibid.*

¹⁹ European Parliament, Resolution of 3 July 2013 on the situation of fundamental rights: Standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), par. 64.

FRA is thus certainly not helpful. Those who ask for a stronger role of the FRA – and I am among them – should therefore call for a Treaty amendment that puts the legal basis of the FRA into the ordinary legislative procedure”²⁰.

Interestingly, in addition to her proposal related to the FRA's mandate, she also called upon another treaty reform that she defined “ambitious”, such as to abolish art. 51 of the EU Charter of Fundamental Rights, “so as to make all fundamental rights directly applicable in the Member States, including the right to effective judicial review (Article 47 of the Charter). This would open up the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law”.²¹

Has the Hungary case opened the Pandora Box or has it just been a scarecrow?

The Hungary case certainly has raised once again the need to strengthen common fundamental values of the European Union and to respect them. In particular, with regards to the principle of the rule of law, the recently Commission stated:

“Mutual trust among EU Member States and their respective legal systems is the foundation of the Union. The way the rule of law is implemented at national level plays a key role in this respect. The confidence of all EU citizens and national authorities in the functioning of the rule of law is particularly vital for the further development of the EU into “an area of freedom, security and justice without internal frontiers”²².

In this context, the FRA could be called to finally fulfill its potential in the field of fundamental rights. However, with regards to the Charter, Vivian Reding’s approach appears quite radical. We are far from a “federalizing step” and the analogy between article 51 of the Charter and art. 3(3) of the Founding Regulation should be rather seen as a check to this evolution, in light of the principle of subsidiarity.

On 13 March 2014, the European Commission adopts a new EU Framework to strengthen the Rule of Law where it envisages a three-stage process for the mechanism. According to the Framework, the FRA can be called to offer its expertise on particular issues relating to the rule of law in Member States within the mechanism set up by the European Commission. This new rule of law framework brings light on how the European Commission will deal with situations where a EU Member State runs the risk of violating

²⁰ V. Reding, (2013), “The EU and the rule of law: What next?”, speech given at CEPS on 4 September 2013, http://europa.eu/rapid/press-release_SPEECH-13-677_de.htm.

²¹ *ibid.*

²² Communication from the Commission, the European Parliament and the Council on a new EU Framework to strengthen the Rule of Law Brussels, 19.3.2014 COM(2014) 158 final/2.

the Article 2 values. At the same time, it inaugurates a new period concerning the protection of fundamental rights, given the strong interdependence between rule of law and fundamental rights. This could be certainly the occasion for the FRA to finally fulfil its potentialities and to overtake the anachronisms, which condition its performance.

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